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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

CARGILL, INCORPORATED
a Delaware Corporation,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the purported extension of the Corps of Engineers' regulatory jurisdiction under the Clean Water Act to reach non-navigable isolated waters solely on the ground of their use by migratory birds oversteps the bounds of the Commerce Clause.

2. Whether the "migratory bird rule," at least as applied to the exercise of regulatory authority over very shallow, non-navigable seasonal "ponds" wholly unconnected to any other body of water, is invalid as inconsistent with any reasonable construction of the Clean Water Act, 33 U.S.C. § 1251, *et seq.*

3. Whether, if it is authorized by statute, the "migratory bird" rule, at least as applied here, is ineffective because it was never offered for public comment as required by the Administrative Procedure Act, 5 U.S.C. § 533.

4. Whether a court is required to assess a civil penalty in every case in which it finds a violation of the Clean Water Act.

PARTIES BELOW

In addition to the parties named in the caption, defendants in the District Court and appellants in the Court of Appeals included the then Secretary of the Army (John O. Marsh), Chief of Engineers (Lt. Gen. E.R. Heiberg), and District Engineer for the San Francisco District of the Corps of Engineers (Lt. Col. Andrew M. Perkins), all sued in their official capacity. Intervenors in the District Court and appellants in the Court of Appeals were The Save San Francisco Bay Association, a non-profit California corporation, and National Audubon Society, a non-profit New York corporation. Leslie Salt Co., the original plaintiff (and defendant in the Government's enforcement action) was a wholly-owned subsidiary of Cargill, Incorporated that was merged into Cargill, Incorporated on September 1, 1991.

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National Geographic Society, *Field Guide to the Birds of North America* (2d ed. 1987)	7
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Statement of Senator Muskie, 118 Cong. Rec. 33699 (1972)	20
U.S. Fish & Wildlife Service, *Wetlands of the United States: Current Status and Recent Trends* (March 1984)	12
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PETITION FOR A WRIT OF CERTIORARI

Cargill, Incorporated, a Delaware Corporation, petitions this Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered in this case on May 22, 1995.

OPINIONS BELOW

The opinions of the Court of Appeals accompanying the judgement from which review is sought are not yet reported (App. A, *infra*). The most recent opinions of the District Court are reported at 820 F. Supp. 478 (N.D. Cal. 1992) (App. C, *infra*). The opinions of the Court of Appeals on the first appeal are reported at 896 F.2d 354 (9th Cir. 1990) (App. D, *infra*). The order of this Court denying the first petition for certiorari is reported at 498 U.S. 1126 (1991)

(App. G, *infra*). The initial decision on the merits of the District Court is reported at 700 F. Supp. 476 (N.D. Cal. 1989) (App. E, *infra*). An earlier opinion of that court on a procedural matter is reported at 660 F. Supp. 183 (N.D. Cal. 1987).

JURISDICTION

The judgment of the Court of Appeals was entered on May 22, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the United States Constitution, of the Administrative Procedure Act, of the Clean Water Act and of the implementing regulations of the U.S. Army Corps of Engineers are reproduced in Appendix H hereto.

STATEMENT

Except for the description of the rulings below (part "C", *infra*), we are entirely content to adopt the statement of the case given by the court of appeals in its recent opinion. Accordingly, with only an occasional footnoted addition, we quote verbatim the relevant portions of that opinion (*see* pp. A-2 to A-5, *infra*).

"Cargill, Inc., the corporate successor to Leslie Salt Co., owns a 153-acre tract of land southeast of San Francisco. The property abuts the San Francisco Bay National Wildlife Refuge and lies near Newark Slough, a tidal arm of San Francisco Bay. A road divides the property into a 143-acre parcel and a 10-acre parcel. Until 1959, Leslie Salt used the property for salt manufacturing. The eastern part of the 143-acre parcel still contains pits that were used to collect

calcium chloride, and the western part contains shallow basins that were used for crystallizing salt.

"This appeal centers on 12.5 acres out of the 143-acre parcel, on which the former crystallizers and calcium chloride pits still lie.[1] During much of the year, these areas are dry. During the winter and spring, however, rainwater creates temporary ponds. Migratory birds use these ponds for habitat.[2] The dispute in this case began in 1985, when Leslie Salt began digging a feeder ditch and a siltation pond on its property and began discharging fill that affected the seasonally ponded areas.

A

"Under the Clean Water Act ('the Act'), the discharge of any 'pollutant' — which includes dredged or fill materials — into 'navigable waters' is forbidden unless authorized by a permit issued by the Army Corps of Engineers (the 'Corps'). 33 U.S.C. §§ 1311(a), 1344(a), 1362(12). 'Navigable waters' is defined in the Act as 'waters of the United States.' 33 U.S.C. § 1362(7). The Act provides no further guidance as to what these terms encompass. The Corps has promulgated regulations defining 'waters of the United States' as:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> * * *
>
> (3) All *other waters* such as intrastate lakes, rivers, streams (including intermittent streams), mudflats,

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[1] The present petition concerns this same acreage. Originally, the Corps claimed jurisdiction over some 110 acres. *See* note 3, *infra*.

[2] *See* note 4, *infra*.

sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, *the use, degradation or destruction of which could affect interstate or foreign commerce* including any such waters:

> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are or could be used for industrial purposes by industries in interstate commerce;

33 C.F.R. § 328.3(a) (emphasis added). *See also* 40 C.F.R. § 230.3(s)(3) (EPA's identical definition).

"In the preamble to the 1986 regulations, the Corps suggested that 'waters of the United States' also includes waters:

> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. Which are or would be used as habitat by other migratory birds which cross state lines; or
>
> c. Which are or would be used as habitat for endangered species; or
>
> d. Used to irrigate crops sold in interstate commerce.

51 Fed. Reg. 41,217 (1986). This preamble material has never been subjected to notice-and-comment procedures and has not been promulgated as an official regulation. The predicate for jurisdiction over the seasonally ponded areas still in dispute in this case is their status as 'other waters' which are used as habitat by migratory birds.

B

"Upon learning that Leslie Salt was discharging fill that affected the seasonally ponded areas, the Corps issued a cease and desist order under section 404 of the Act. Leslie Salt filed suit challenging the Corps' jurisdiction over the property. The United States also brought an enforcement action, which was consolidated with Leslie Salt's suit.[3]

"The district court originally held that the Corps had no jurisdiction over Leslie Salt's property. *Leslie Salt Co. v. United States*, 700 F. Supp. 476 (N.D. Cal. 1989) ('*Leslie Salt I*'). On the issue that is currently before this court, the district court held that the temporary ponds in the crystallizers and the pits were not 'other waters' under 33 C.F.R. § 328.3(a)(3), because they had been artificially created and were dry much of the year.

"On appeal, [the court of appeals] reversed and remanded. *Leslie Salt v. United States*, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126 (1991) ('*Leslie Salt II*'). The court held, among other things, that the fact that the crystallizers and pits were artificially made and dry part of the year did not exclude them from being 'other waters.' *See id.* at 359-60. The court also held that '[t]he commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species.' *Id.* at 360. The court thus reversed and remanded for a factual determination of which parts of Leslie Salt's property had sufficient connections to interstate

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[3] At the time, the Corps claimed jurisdiction over some 110 acres of the property, almost entirely on the basis that they constituted "adjacent wetlands." Except for some nine acres, long removed from contention, the wetland claim was rejected by the District Court on the basis of factual findings and was abandoned by the Government on the first appeal. From that point, the "other waters" claim came to the fore.

commerce to be subject to the Corps' jurisdiction under the Act.

"On remand, the district court found that roughly 12.5 acres of seasonally ponded areas, primarily in the calcium chloride pits, were subject to jurisdiction. *Leslie Salt Co. v. United States*, 820 F. Supp. 478 (N.D. Cal. 1992) ('order for judgment') ('*Leslie Salt III*'). The court justified this holding by referring to the evidence summarized in the United States' Memorandum on Remand. *See id.* at 480. Among other things, this Memorandum states that some 55 species of migratory birds use the seasonally ponded areas as habitat.[4] The court also held that Leslie

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[4]The statement regarding 55 species of migratory birds using the seasonally ponded areas is misleading. Even assuming the District Court meant to endorse all the representations in the Government's Memorandum (which is doubtful, given the very limited contest on remand), it should be stressed that many of the sightings recited there are of *upland* birds, not associated with water; some of the visits were to areas *not* in dispute; and most were too occasional and erratic to justify terming the site visited a meaningful "habitat."

Moreover, the true picture is very much more modest than the Memorandum suggests. Accepting the evidence of the Government's own expert who studied the site in the winter of 1986-1987, the average number of the most prevalent species of waterfowl or waterbirds (the mallard and the least sandpiper) seen at one time during the relatively wet month of March on the entire 153-acre property was *less than 12 birds* of each kind. Exh. 541, Table 1. For the next most frequent such visitor, the killdeer, the comparable figure was 3 birds, and for the nine other species of water-associated birds, the *greatest* number ever spotted on one visit was *five* specimens. *Ibid.* In fact, it appears only one ruddy duck, one cinnamon teal, and one greater scaup was seen, once each, during the entire 1986-1987 winter, and then only at one location. Exh. 541 at 4 and Table 1. Except for sandpipers, the figures are not significantly greater in March 1985 — before any arguable violation by Cargill. Exh. 541, Table 1. Finally, it was said to be likely that at least some of these birds were strays or "day-trippers" from the adjacent refuge (Tr. 1263) and that in the "Mediterranean" climate of the Bay Area, some species (notably the mallard, northern pintail and cinnamon

Salt violated the Act in three of these areas by discharging fill or altering structures without a permit at specific points. Finally, in proceedings addressing the issue of remedies, the court ruled that penalties are mandatory under section 309(d) of the Act when a violation has been found, and that the United States was entitled to injunctive relief to restore the property to its preexisting condition. *See id.* at 483-84 ('order regarding remedies').[5] The parties subsequently stipulated to a penalty of $50,000 and a restoration plan. The stipulation preserved Cargill's right to appeal the issue of whether penalties are mandatory."[6]

C

On the second appeal, a differently constituted panel of the Ninth Circuit affirmed (App. A, *infra*). Except on the penalty issue (Question 4, *supra*), however, it did so by applying the doctrine of the law of the case. In the panel's view, it could not reconsider the prior decision even if persuaded that it was wrong, so long as it was not "*clearly* wrong." Pp. A-7 to A-8, *infra* (emphasis added).

Following this unusual standard for questions of law, the court proceeded to discuss each of the issues identified here as Questions 1-3, *supra*. As to the administrative law point (Question 3), the panel expressed its ambivalence about the

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teal ducks and the killdeer) often do not in fact migrate out of state. *See* Exh. 597 at 5 and Table 1 at 2, 6. *See also* L. & J. Westrich, *Birder's Guide to Northern California*, xv-xvii, 108, 273, 275, 278 (1991); National Geographic Society, *Field Guide to the Birds of North America*, 15, 22, 52, 54, 68, 72, 74, 76, 102, 106 (2d ed. 1987).

[5]Although published together (App. C, *infra*), the District Court's opinion on the merits ("Order for Judgment," entered Jan. 6, 1992), and its opinion on the remedy issues ("Order Regarding Remedies," entered July 22, 1992), were delivered more than six months apart.

[6]This stipulation is incorporated in the District Court's Final Judgement, entered April 26, 1993 (App. B, *infra*).

right result, but concluded that it was "plausible" to find that the migratory bird rule was "merely an interpretive rule, and thus not subject to the notice-and-comment requirements of the Administrative Procedure Act." P. A-10, *infra*. Similarly, in dealing with Question 2, *supra*, the court opined that "Cargill's arguments might well deserve closer consideration" if the issue were being presented for the first time, but that their earlier rejection was not "clearly erroneous." Pet. App. at A-12. And like treatment was given to the contention that the migratory bird rule overstepped the boundaries of the Commerce Clause (Question 1). It was acknowledged that the rule "certainly tests the limits of Congress's commerce powers and, some would argue, the bounds of reason"; yet, the court concluded that the prior ruling denying the constitutional challenge "cannot be considered clearly erroneous." P. A-14, *infra*.

On the mandatory penalty issue (Question 4, *supra*), the court below divided. Essentially on the basis of precedent elsewhere, the majority approved the District Court's ruling that a monetary penalty *must* always be imposed when a violation of the Clean Water Act is found. Pp. A-15 to A-17, *infra*. Judge O'Scannlain dissented on this issue, pointing to dicta in this Court and in the Sixth Circuit and legislative history suggesting that penalties are discretionary, and concluding that the statutory language "shall be subject to [penalties]" is *not* equivalent to "shall pay." Pp. A-17 to A-19, *infra*.

REASONS FOR GRANTING THE WRIT

The present case is before the Court for the second time. On the prior occasion, certiorari was denied, with one recorded dissent. *Leslie Salt Co. v. United States*, 498 U.S. 1126 (1991). Since then, however, several things have changed, combining, we submit, to tilt the balance in favor of granting the writ.[7]

1. First is this Court's decision in *United States v. Lopez*, No. 93-1260 (Apr. 26, 1995), which undermines the holding below insofar as it sustains the constitutionality under the Commerce Clause of the so-called "migratory bird rule"— extending Clean Water Act regulatory jurisdiction to wholly intrastate seasonally ponded areas that are isolated from any interstate water body and have no arguable connection with interstate commerce except only their occasional use by birds that cross State lines. Conceivably, the Court might vacate the decision below and remand the case for reconsideration in light of *Lopez*. But, for two reasons, we urge against that course.

The fact is that the court of appeals' decision was rendered some four weeks *after Lopez*, which we expressly brought to that court's attention. Thus, even though *Lopez* is not mentioned in the opinion, we must assume the court of appeals considered it. There is, moreover, a stronger reason for eschewing a remand in the present context. It is that under the rule counselling avoidance of constitutional adjudication where fairly possible, the court of appeals presumably should not decide the *Lopez* question, at least directly.[8]

2. The second changed circumstance is the unusual tenor of the recent opinion below. Under the constraint of

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[7] Needless to say, the earlier denial of certiorari is not a jurisdictional bar to the grant of the present application. *E.g.*, *Mercer v. Theriot*, 377 U.S. 152, 153-154 (1964); *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 672 n. 19 (1979). *Cf. Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 881 n. 1 (1990); *Christiansen v. Colt Indus.*, 486 U.S. 800, 817-818 (1988).

[8] Arguably, on a remand the court of appeals might view *Lopez* as introducing a new constitutional doubt that altered the legal climate so as to require setting aside the law of the case obstacle and reconsidering *de novo* the statutory question (Question 2, *supra*).

the law of the case doctrine, the present panel declined to reconsider the earlier decision unless it could be shown "not only that the *Leslie Salt II* court's holding regarding the migratory bird rule was wrong, but that it was clearly wrong." Pp. A-7 to A-8, *infra*. The panel then proceeds to suggest that each of the earlier rulings on the issues presented here as Question 3 (*see* pp. A-9 to A-10, *infra*), Question 2 (*see* p. A-12, *infra*), and Question 1 (*see* p. A-14, *infra*), was quite possibly wrong, but not "clearly" so. The result is most unsatisfactory and strongly invites resolution by this Court which, of course, is not bound by any law of the case announced in a lower court. *See* n.7, *supra*.

3. Third, there is now, as was not true before, a square and persisting conflict between the Fourth and Ninth Circuits on the important administrative law question whether the migratory bird rule could be made effective without public notice and opportunity for comment in accordance with the Administrative Procedure Act, 5 U.S.C. § 553 (Question 3, *supra*). In 1990, it was not entirely clear whether the court of appeals had considered the issue (the opinion being silent) and whether, in any event, the Government would moot the point by offering the migratory bird rule for notice and comment, as promised in a Joint Memorandum of the U.S. Army Corps of Engineers and the Environmental Protection Agency. *See* No. 90-792, Pet. App. A-46 to A-49. Today, five years on, no rulemaking having been announced and the court below having expressly stated that the point *was* decided (p. A-8, *infra*), it is plain the decisional conflict and the differing legal regimes in the Fourth and Ninth Circuits are to continue indefinitely unless this Court intervenes.

4. Fourth, there is no longer any basis for viewing the decision of the court of appeals as "interlocutory" and not sufficiently "final" or "ripe" for review in this Court. *See*

No. 90-792, Br. of Fed. Resp. in Opp. 8-9. At the 1990 Term, the Government opposed our Petition with heavy reliance on such representations, claiming that "it would be premature to consider the [validity of the migratory bird rule] here, where the applicability of the regulation has not yet been decided," and that "proceedings on remand [to the district court] might . . . greatly clarify the interests at stake and similar cases and the precise application of the Corps' regulations in this setting . . . and might [even] moot this case." *Id.* at 20. So far as that ground of opposition weighed with the Court, it is no longer present.

Whatever doubts may have existed about the practical impact of the migratory bird rule are resolved by the specific application of the rule to portions of petitioner's property which, as the court below noted, are merely "seasonally ponded areas" that "have no hydrological connection to any other body of water" and which "for much of the year . . . do not even exist." P. A-12, *infra*. *See also* p. A-1, *infra* ("isolated, seasonally dry interstate waters used only by migratory birds"); p. A-2, *infra* ("During much of the year, these areas are dry. During the winter and spring, however, rainwater creates temporary ponds."). What is more, the migratory birds whose visits were deemed sufficient included many that were in no sense *water birds*, but simply common upland birds coming to drink or rest. Revealed in all its breadth, the migratory bird rule encompasses tens of millions of acres not otherwise within the reach of the Clean Water Act.[9] Whether such a huge extension of regulatory

[9]The present case involves isolated temporary ponds that do not qualify as "wetlands" but were held to constitute "other waters" under the Corps' Clean Water Act regulations. The more usual case invoking the migratory bird rule will be that of isolated wetlands. It has been estimated that there are some 90 million acres of "palustrine" freshwater wetlands within the continental United States, not including Alaska. *See* Frayer, et al., *Status and Trends of Wetlands and Deepwater Habitats in the Conterminous United States, 1950's to 1970's*, 3, 20-21,

jurisdiction is validly accomplished plainly is of enormous importance to landowners throughout the Nation. This was a question expressly reserved by this Court in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 124 n.2, 131 n.8 (1985). It is now fully ripe for decision here.

5. Finally, there is now a new issue: whether the judicial imposition of a monetary penalty is mandatory upon a finding that the Clean Water Act has been violated, regardless how minor the infraction (Question 4, *supra*). The question only emerged after remand to the district court, which answered it in the affirmative, as did the court below in a divided decision. This issue of obvious recurring importance has created a conflict in the courts (*see* p. A-18, *infra*), and the holding below is at odds with *dicta* in this Court (*see* p. A-19, *infra*). Accordingly, the penalty question independently merits review here.

A. The Constitutional Question

The court below expressly found that, if authorized by the Clean Water Act, the migratory bird rule is within the power of Congress under the Commerce Clause. In its first opinion, the Court of Appeals simply asserted without discussion that "[t]he commerce clause power . . . is broad

22-23 (Apr. 1983); U.S. Fish & Wildlife Service, *Wetlands of the United States: Current Status and Recent Trends* vii, 5, 9, 28, 29 (Mar. 1984). Unlike "marine," "estuarine," "lacustrine" and "riverine" wetlands, palustrine wetlands are not typically associated with any "deepwater habitat." Frayer, *Status and Trends, etc., supra*, at 12-13; USF&WS, *Wetlands of the United States, etc., supra*, at 9-11. Thus, we may assume that a large part of the 90 million acres is isolated from any navigable waterway. To these wetland acres in the lower 48 must be added substantial areas of isolated wetlands in Alaska (presumably an important share of Alaska's estimated total of 200 million acres, USF&WS, *Wetlands of the United States, etc., supra*, at 28), and some in Hawaii, as well as isolated non-navigable "rivers, streams, . . . mudflats, sandflats, . . . sloughs, prairie potholes, [and] wet meadows" elsewhere that do not constitute wetlands but attract migratory birds.

enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds." *Leslie Salt II*, 896 F.2d at 360, p. A-50, *infra*. In its most recent decision, although conceding that "[t]he migratory bird rule certainly tests the limits of Congress' commerce powers and, some would argue, the bounds of reason," the court declined to reconsider its previous holding, which was deemed not "clearly erroneous" and therefore binding as the law of the case. Pet. App. at A-14. The result, we submit, is in conflict with this Court's decision in *United States v. Lopez*, No. 93-1260 (Apr. 26, 1995).

1. As in *Lopez*, the prohibition in suit has nothing directly to do with interstate commerce. The discharger may be a local landowner with no interstate connection and his actions may have no commercial purpose. By hypothesis, the "waters" involved are entirely intrastate, are isolated from any interstate waterbody, and serve no interstate function. They are regulated solely on the basis of their use by migratory birds. Yet, obviously enough, the self-propelled flight of birds across State lines is not itself interstate commerce. Indeed, when that proposition was last tentatively vented here, it was laughed out of Court. See Tr. of Oral Arg. 21-22 in *United States v. Riverside Bayview Homes*, No. 89-701 (October 16, 1985).[10] Accordingly,

[10]Contrary to the opinion below (p. A-16, *infra*), there is no suggestion in *Hughes v. Oklahoma*, 441 U.S. 322 (1979) — or any other case in this Court — that fish swimming under their own power across a state boundary, or birds in free flight crossing an interstate line, are engaged in commerce between the States. *Hughes*, like *Maine v. Taylor*, 477 U.S. 131 (1986), and *Andrus v. Allard*, 444 U.S. 51 (1979), involved the *man-initiated* transportation of captive species for commercial purposes. *See also Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977), where the Court spoke of the movement of *vessels* from one state to another in search of fish, and back again to processing plants as an activity which Congress could conclude affects interstate commerce. *Id.* at 282 (emphasis added).

local activity that bears on such bird migration — even if adversely (not a showing required under the migratory bird rule or attempted here) — is not within the reach of the Commerce Clause unless some true interstate commerce can be shown to be "substantially affected" by the challenged activity. *Lopez*, slip op. at 10. As in *Lopez*, that finding cannot be made here without "pil[ing] inference upon inference." *Id.* at 19.

2. The present case, in fact, is more estranged from the concerns of the Commerce Clause than *Lopez*. It was there stressed that possession of a gun in a school zone was not itself economic activity and was a matter traditionally left to State regulation. *Id.* at 10-12, 16. So here. But, whereas in *Lopez* the guns themselves had already been articles of commerce (*see* Dissent of Stevens, J., slip op. at 1), the same cannot be said of the birds that come to the acreage in suit. Even if some ducks, at another site, eventually become commercial goods, most migratory birds either have no commercial value or are protected species. And, in any event, the migratory bird rule does not depend on the "commercial" character of the avian visitors.

So, also, the potential link with interstate commerce is even more remote in our case. In *Lopez*, it was indisputable that gun-related violence on school premises inhibits education and that impaired education has economic consequences. Yet that connection was deemed constitutionally insufficient. *Id.*, slip op. at 17-19. Here, it is more difficult to trace *any* significant effect on interstate commerce.

To be sure, it has been said that "millions of people annually spend more then a billion dollars on hunting, trapping, and observing migratory birds." P. A-13, *infra*, quoting *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261 (7th Cir. 1993). But, assuming the correctness of that statement, it does not arguably justify the indiscriminate migratory bird rule. As already noted, most migratory birds

are either of no interest to hunters and trappers or are protected from them. And only a few species, we may surmise, attract out-of-state bird watchers. Moreover, we have no evidence that the population of any commercial species would be reduced by the non-regulation of wholly isolated waters, as opposed to wetlands adjacent to interstate or international waterbodies.

3. Here, even less than in *Lopez*, is there any room for argument based on "cumulative effects." As the court below acknowledged, "[i]n this case, there is no evidence of human contact with the seasonally ponded areas." P. A-14, *infra*. And, given the immediate proximity of the huge wildlife refuge abutting San Francisco Bay, it is reasonable to conclude that filling the very few acres of occasionally watered parcels in suit would have no measurable effect on the birds. In sum, the migratory bird rule, as applied here, reaches well beyond the zone of activity that affects interstate commerce and a multiplication of such instances cannot bring the case within the Commerce Clause. A thousand naughts still equals zero.

For better or for worse, the migratory bird rule, like the Gun-Free School Zones Act involved in *Lopez*, "contains no jurisdictional element which would ensure, through case-by-case inquiry," that the filling of particular isolated waters "affects interstate commerce." *Lopez*, slip op. at 13. Nor can such a requirement be read into the rule, given the unambiguously broad sweep of its language. *Ibid.* The migratory bird rule does not require a "commercial" bird that may, after capture, become an object of "commerce between the States." Nor does it depend on interstate *human* travellers (whether hunters, scientists, or bird watchers). If it were otherwise, there would be no need to restrict coverage to migrating birds which cross state or international boundaries. Plainly, the theory of the migratory bird rule — however extravagant — is that the interstate or international

flight of the birds is both necessary and sufficient to satisfy the Commerce Clause.

4. Finally, as in *Lopez*, the Court cannot rely on legislative findings to discern a substantial link with interstate commerce, "even though no such substantial effect [is] visible to the naked eye." *Lopez*, slip op. at 14. In this instance, moreover, we cannot safely assume that Congress ever made the required finding, albeit silently. For, unlike the statute in *Lopez*, neither the text nor the legislative history of the Clean Water Act remotely suggests that the migratory bird rule was contemplated. See pp. 17-21, *infra*.

In sum, the migratory bird rule — at least as applied here — overreaches the boundaries of the Commerce Clause as defined in *Lopez*. On this basis, the Court could strike it down. But, in the present case (unlike *Lopez*), there are non-constitutional grounds for invalidating the rule and, applying the imbedded principle of avoiding serious constitutional questions where possible (*see Lopez*, slip op. at 13), the Court presumably will wish to consider those alternative arguments, to which we now turn.

B. The Statutory Question

Our primary submission is that the migratory bird rule is inconsistent with any reasonable interpretation of the Clean Water Act. We believe that contention should prevail even if the power of Congress to enact the bird rule were clear. But, of course, that result is even more strongly compelled by what must be, at the least, a serious doubt as to the constitutional validity of the rule. In such circumstances, the Court has always strained to read the statute before it so as to avoid the constitutional question. *See Lopez*, slip op. at 13 and cases there cited. Here, no one dare claim that Congress has issued a "clear statement" authorizing the migratory bird rule; on the contrary, the statutory language (as well as its legislative history and its administrative

construction in the first dozen years) leaves it entirely open to construe the Clean Water Act as not intending to reach non-navigable, isolated waters solely on the basis of their use by migratory birds. Indeed, we submit any other reading is unreasonable.

1. We first look to the *statutory text*. The Clean Water Act prohibits discharges into "navigable waters." Obviously, the site in suit is not arguably navigable itself; it is not navigable now, it never has been, and it never will be. Nor is the site in any sense part of a navigable water system. Unlike, *e.g.*, an "adjacent wetland," it is not the non-navigable "edge" of a navigable waterbody; it is not a tributary of a navigable waterway; it is not even a remote "pocket" or "arm" or "finger" of a navigable waterbody. As the court below acknowledged (p. A-12, *infra*), the site is wholly *unconnected* to any navigable water; it is, in the terms used in the regulations, an "isolated water."

That would be the end of the case if the Act did not contain a somewhat odd definition, telling us that "navigable waters" means "waters of the United States." As the Court in *Riverside* remarked, this makes clear that the initial reference to navigability is of "limited import." *Riverside*, 474 U.S. at 133. But "*limited* import" is not *no* import. All the Court did in *Riverside* was condone a Corps assertion of jurisdiction over the *edge* of a plainly navigable waterbody, its *adjacent* wetlands, while twice pointedly distinguishing and expressly declining to approve the Corps regulations extending jurisdiction to *isolated* waters and wetlands, like the site involved here. *Id.* at 124 n.2, 131 n.8.

What does "waters of the United States" mean? Contrary to the Government's persistent claim that the term is entirely open-ended, "waters of the United States," or a similar phrase, has a history in federal statutes and has been used to include the non-navigable "adjuncts" of a navigable waterbody, such as non-navigable pockets or edges, or

tributaries;[11] but not wholly isolated non-navigable waters. And, less than a decade before our 1972 enactment, this Court had accepted as self-evident that the statutory expression "streams . . . over which Congress has jurisdiction under its authority to regulate commerce" reached no further than "tributaries of river systems necessitating supervisory power to preserve or improve downstream navigability or water commerce generally." *Federal Power Comm'n v. Union Electric Co.*, 381 U.S. 90, 97 (1965). *See also id.* at 97 n.9.

This is the natural meaning of the provision in the present context. Indeed, why refer to "navigable waters" at all if, by later definition, the idea of navigability is to be abandoned altogether? We must gi e Congress credit for avoiding the nonsense, or the deception, of writing "navigable waters" when it meant to embrace waters with not the remotest connection to a navigable waterbody.

It is said the Clean Water Act is concerned with pollution, a problem not limited to navigable waters and their "adjuncts"; and, moreover, that the Act expresses a concern for *wildlife*, which also frequents isolated, non-navigable waters. *See* p. A-11 *infra*. But this does not answer our point. Ignoring the limitations of the text in the name of furthering broad declarations of purpose does not effectuate the intent of Congress. *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, 374 (1986). More often than not, the legislative solution to a problem involves a compromise, deliberately limiting the means authorized in achieving a general goal.

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[11] *See, e.g.*, Rivers and Harbors Act of 1894, § 5, 33 U.S.C. § 499; Act of Feb. 19, 1895, § 2, 33 U.S.C. § 151; Rivers and Harbors Act of 1899, § 10, 33 U.S.C. § 403; Act of Sept. 15, 1922, 33 U.S.C. § 472; Act of June 22, 1936, § 1, 33 U.S.C. § 701(a).

Thus, here, Congress could well have been focussing on navigable waters and their tributaries because these are the waters impressed with a *national, federal* interest. Activities there are within federal jurisdiction, as *Federal Power Commission v. Union Electric* explains, since those waters implicate the federal navigational servitude under the Interstate and Foreign Commerce Clauses. As to these "federal" waters, Congress was, of course, not primarily interested in assuring their navigability. Rather, it was intent on keeping them clean, or making them cleaner — for the benefit of the fish, the waterbirds, and the people who enjoy them. These concerns justify reading "waters of the United States" to reach the non-navigable *adjuncts* of "federal" waters, because pollution of such "edges" or "pockets" or tributaries, would pollute the navigable waterbody itself. But, unconnected, isolated waters obviously do not have that effect.

If Congress had meant to reach isolated, non-navigable waters whose use "affects" interstate commerce, it knew the formula — well established before 1972. *See, e.g.*, § 201(b) of Civil Rights Act of 1964, 42 U.S.C. § 2000a(b) construed in *Atlanta Motel v. United States*, 379 U.S. 241 (1964), and *Katzenbach v. McClung*, 379 U.S. 294 (1964). The Court ought not rewrite the Clean Water Act to reach "all waters whose use may affect interstate or foreign commerce." That definition easily could have been given. It was not, and it cannot be added now.

2. The *legislative history* of the Clean Water Act confirms our submission. In all the thousands of pages leading to the 1972 amendment, isolated waters are not once mentioned — whether by Members of Congress, Executive Department officials, State representatives, potentially affected landowners, environmental groups, or other witnesses. The Government has never produced a single such reference and the opinion below accepts that none is to be found. P. A-11,

infra. Yet the issue implicates millions of acres. It would hardly have been passed in silence.

The legislators wrestled with the question of defining "navigable waters" and ultimately left the reach of the law somewhat vague. They wanted to avoid a "narrow" or "traditional" definition. But no one remotely suggested simply *altogether abandoning* any tie to navigable waters. We need not surmise whether the legislators believed to do so would overstep constitutional boundaries, or would stray beyond the proper scope of federal legislation, or would expose the Government to "taking" claims. What is clear is that they did not dream they were reaching isolated potholes, much less shallow, temporary and isolated accumulations of rainwater. If that had been proposed, *some* legislators, at least, predictably would have questioned the propriety or the constitutionality or the expense of going so far.

But, it is insisted, the legislative history of the 1972 Act reflects Congress' intent to "go to the constitutional limit." See p. A-11, *infra*. That is a false reading. What was, in fact, said, was that Congress intended "*the term 'navigable waters'* be given the broadest possible constitutional interpretation." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972) (emphasis added); *see also*, 118 Cong. Rec. 33699 (1972) (statement of Sen. Muskie). That is a very different thing. The concept of "navigable waters" *does have* a constitutional dimension, under the Admiralty Clause, for the purposes of the Equal Footing Doctrine, and as defining the scope of the federal navigational servitude. This last is presumably the most relevant, and it is the subject of the Court's cases cited in the debates.

This is *not* a statement that Congress was exercising to the full all its Commerce Clause powers — which, of course, are not limited to water. The Government has consistently overstated what Congress actually said and sometimes has

successfully misled a court. But it is notable that its effort to do that in this Court in the *Riverside* case failed. The Court there did *not* rest its decision on the easy proposition that the Clean Water Act meant to reach to the constitutional limit.

Looking to what was said in 1977, when the relevant provision of the statute was not amended, is a poor guide to what was meant by those who wrote the Clean Water Act five years earlier. It *was* then agreed, on all sides, as this Court noted in *Riverside*, 474 U.S. at 135-139, that the law reached *adjacent* wetlands. Invoking the 1977 debates as to *that* point, which was universally accepted, does not justify looking to 1977 on the very different, and far from agreed, proposition that *isolated* waters and wetlands were included. But, in any event, there was in 1977 no Congressional reference to anything remotely resembling the migratory bird rule of today.

3. Invocation of *administrative construction* does not advance the Government's case. Of course, deference to the interpretation of a statute by those charged with administering it is normally appropriate. As *Riverside* holds, this principle applies to the Corps' interpretation of the Clean Water Act. *Riverside*, 474 U.S. at 131. But it is unavailing in the present context.

The deference due is substantially diminished, if not eliminated, when, as here, the Corps' interpretation comes 13 years after enactment and involves a change of position that does not result from careful reconsideration based on experience, but is forced on the agency by the relentless pressure of two powerful Senators. That is the present situation, as a reading of the 1985 Subcommittee Hearings at which the migratory bird rule was invented, will attest. *See Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public*

Works, 99th Cong., 1st Sess. (1985) ("1985 Oversight Hearings"), especially at 114-116, 122, 129, 156-157, 160, 168-169, 169-171, 171-172, 193-194, 200, 205, 207, 208-209. *See also Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726 (E.D.Va. 1988), *aff'd*, 885 F.2d 866 (4th Cir. 1989).

In any event, the rule of deference only requires acceptance of a *reasonable* interpretation when the statute itself is *ambiguous*. Here, we submit, the text of the Clean Water Act, read in the light of its legislative history, does *not* leave us uncertain whether Congress meant to reach anywhere near as far as the migratory bird rule would take us. There is, accordingly, no room for administrative construction on this point. And, in any event, the migratory bird rule is not a *reasonable* interpretation of the intended reach of the statute.

4. It should be added that, while there is no square conflict on the statutory question, a greater number of Circuit Judges have condemned or doubted the validity of the migratory bird rule than have vindicated it. When we put aside the opinion below as constrained by the law of the case doctrine, there are only two judges of the Ninth Circuit supporting the rule and one judge of the Seventh. *Leslie Salt II, supra; Hoffman Homes, supra* (dictum).[12] Of the opposite view, one may count at least five Circuit Judges.

Presumably, the tentative position of two judges of the Fourth Circuit panel in *Tabb Lakes, supra*, is that the migratory bird rule is, or probably is, *ultra vires*. *See* 20 Envtl. L. Rptr. at 20009, adopting the District Court opinion, which expressed "grave doubts" as to the substantive validity of the migratory bird rule. We also invoke the

[12]In light of its ultimate holding that the migratory bird rule was inapplicable, the view expressed concerning its validity is essentially dictum.

wholly unequivocal opinions of Judge Manion of the Seventh Circuit and Judge Rymer of the Ninth condemning the rule on constitutional or statutory grounds or both. *Hoffman Homes, Inc. v. EPA*, 961 F.2d 1310, 1312-1323 (7th Cir. 1992), opinion vacated but adhered to by Judge Manion on rehearing, 999 F.2d at 262-263; *Leslie Salt II, supra*, 896 F.2d at 361-362 n.1. And, finally, we note the doubts expressed by Judge Merritt of the Sixth Circuit. *United States v. Larkins*, 852 F.2d 189, 193-194 (6th Cir. 1988) (concurring opinion).

C. The Administrative Law Question

As the court below stated, "[i]t is undisputed that the [migratory bird rule] has not been subjected to notice and comment," as required for "substantive" rules by the Administrative Procedure Act. P. A-8, *infra*. The consequence is that the rule is ineffective unless it properly can be characterized as a mere "interpretive" regulation. APA, 5 U.S.C. § 553(b)-(d); *Chrysler Corp. v. Brown*, 441 U.S. 281, 301-303 (1979).

1. The grounds on which the Ninth Circuit concluded that the migratory bird rule was an "interpretive" regulation, exempt from the notice-and-comment requirement of the APA, are not clearly articulated. In its first opinion, the court decided the question in total silence. *See* p. A-8, *infra*. And the second panel, applying the law of the case, merely concluded that the earlier ruling was "plausible." P. A-10, *infra*. Nevertheless, it is now the law of the Ninth Circuit that the migratory bird rule is effective without notice and comment and this is in direct conflict with the law of the Fourth Circuit, established in the *Tabb Lakes* case, *supra*.

2. The Ninth Circuit decision, we submit, is, in any event, plainly wrong. There is no gainsaying that the adoption of the migratory bird rule in 1985 effected a new, and massive, extension of regulatory jurisdiction by the Corps of

Engineers and EPA. The Government cannot seriously maintain that the rule was mandated by the statute itself; it can only be justified, if at all, as an administrative implementation of Clean Water Act goals pursuant to legislatively delegated authority. Whatever the opinion of the Ninth Circuit, that describes a "substantive" rule, subject to the notice-and-comment provisions of the APA. *See Chrysler Corp. v. Brown*, *supra*, 441 U.S. at 301; *Batterson v. Francis*, 432 U.S. 416, 425 n.9 (1977); *Lincoln v. Vigil*, 124 L. Ed. 2d 101, 114-115 (1993). In fact, that was the view of the Corps itself, at the highest levels, in mid-1985. *1985 Oversight Hearings* at 171-172 (Asst. Secretary Dawson: "before we could promulgate such a position, it would very likely require a rulemaking"). To hold otherwise is effectively to write out of the law the salutary requirement that an administrative agency intending to impose new rights and duties must afford the affected public an opportunity to comment on the proposed rule.

D. The Penalty Question

Although no persuasive reason is given for doing so, the majority below chose to follow the Eleventh Circuit in ruling that monetary penalties must be assessed by a court finding a violation of the Clean Water Act. Pp. A-15 to A-17, *infra*. For our part, we believe the dissenting Judge has the better of the argument on this issue. See pp. A-17 to A-19, *infra*. But, at the outset, we stress that the disagreement is not merely between the Members of a panel of the Ninth Circuit.

1. The majority below purports also to be following the Fourth Circuit in *Stoddard v. West Carolina Regional Sewer Authority*, 784 F.2d 1200, 1208 (4th Cir. 1986). P. A-16, *infra*. But even the abbreviated quotation from that case, including the qualification "under the circumstances of this case," alerts us that the Fourth Circuit was *not* there

announcing the inflexible rule adopted below. Indeed, on the same page, the court went on to say that "a fine must be imposed *when the violations have been as pervasive as those perpetrated by the Sewer Authority during the extended period from 1977 to 1983.*" *Ibid.* (emphasis added). This more flexible approach is confirmed by precedent in the Circuit both before and after *Stoddard*. Thus, in *State Water Control Board v. Train*, 559 F.2d 921, 927 (4th Cir. 1977), the Fourth Circuit unequivocally stated that "in cases where enforcement proceedings are brought [under the Clean Water Act], whether by EPA or by private citizens, the courts retain *equitable discretion* to determine *whether* and to what extent fines and injunctive sanctions should be imposed for violations [in good faith]" (emphasis added). And, more recently, the same Court wrote that "once an *ongoing* violation is shown, the court is *virtually* obligated to assess penalties." *Chesapeake Bay Found. v. Gwaltney of Smithfield, Ltd.*, 890 F.2d 690, 697 (4th Cir. 1989) (emphasis added). Plainly, this is not a statement that a court is bound to assess penalties in *every* case in which a violation is found — even where the violator was acting in good faith, did not profit by its act, the violation has long ceased, and no harm to the environment has resulted.

The upshot is that the Fourth Circuit is *not* in harmony with the Eleventh (and now the Ninth) on this issue, but, rather, is *in conflict* with those Circuits. And, as the dissenting Judge below noted the Sixth Circuit has declared the same disagreement in dictum. P. A-18, *infra*, citing *United States v. Winchester Mun. Util.*, 944 F.2d 301, 306 (6th Cir. 1991). There are also District Court decisions at odds with the ruling below. *See* p. A-18, *infra*.

2. The mandatory penalty rule entrenched by the majority below also contradict *dicta* in *this* Court. Speaking of judicially imposed fines (before administrative penalties had been authorized), the Court stated that under the Clean

Water Act "civil penalties, payable to the Government, also *may* be ordered by the court." *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 14 n.25 (1981) (emphasis added). So, also, in *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49, 53 (1987), it was said that "if the citizen prevails in such an action, the court *may* order injunctive relief and/*or* impose civil penalties" (emphasis added). And in *Tull v. United States*, 481 U.S. 412, 427 (1987), the Court spoke of the role of the trial court in a Clean Water Act case to "determine the amount of penalty, *if any*" (emphasis added). *See also id.* at 425 (suggesting that injunctive relief may be awarded instead of a mandatory fine). And see *United States v. Larkins*, 657 F. Supp. 76, 87 (W.D. Ky. 1987), *aff'd*, 852 F.2d 189 (6th Cir. 1988), *cert. denied*, 489 U.S. 1016 (1989); *United States v. Key West Towers, Inc.*, 720 F. Supp. 963, 965 (S.D. Fla. 1989); W.L. Want, *Law of Wetlands Regulation*, § 12.03, p. 12-5.

3. On the merits, it ill behooves the Government to claim that "shall" precludes discretion when it has persuaded the courts that an apparently more unequivocal "shall" in the same Section 309 of the Clean Water Act is not mandatory. *See Dubois v. Thomas*, 820 F.2d 943, 948-949 (8th Cir. 1987), and *Sierra Club v. Train*, 557 F.2d 485, 490-491 (5th Cir. 1977) (construing CWA § 309(a)(3), 33 U.S.C. § 1319(a)(3)). But, in any event, it is enough to recognize (with Judge O'Scannlain, *see* pp. A-17 to A-18, *infra*) that "shall be subject to a civil penalty" is *not* the equivalent of "shall pay" or "shall be assessed a civil penalty." Rather, the words tell us that the violator is *exposed* to being fined — if the Government seeks that remedy and the court agrees to impose it. *See* 2 S.M. Novick, *et al.*, *Law of Environmental Protection*, § 12.08[1][c], pp. 12-172 to 12-173. This is, indeed, what the legislative history indicates, the relevant Report stating that "the courts are *authorized* to apply appropriate civil

penalties under Section 309(d)." H.R. Rep. No. 911, 92d Cong., 2d Sess. 133 (1972) (emphasis added) (quoted at p. A-18, *infra*).

In sum, the provision that the violator is "subject to" a civil penalty is the equivalent of saying that the Court "may" impose such a fine. To be sure, as the majority below stressed (p. A-16), that is the formulation chosen in the Clean Water Act in respect of *administrative* penalties: "The Administrator or Secretary, as the case may be, *may* . . . assess a class I civil penalty or a class II civil penalty" against a violator. CWA § 309(g)(1), 33 U.S.C. § 1319(g)(i) (emphasis added). But it proves nothing that Congress chose different words, albeit with the same import, when addressing judicial discretion to impose fines. Since there is no reason to suppose that the EPA Administrator, when acting as an adjudicator, was meant to enjoy greater latitude than a judge, we must conclude that neither is precluded from declining to assess penalties in appropriate cases. The court's discretion in the matter of monetary penalties may not be as broad as with respect to equitable remedies. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). But, even here, the judge is not a mere automaton, implementing the Government's choices.

CONCLUSION

For the reasons stated, certiorari should be granted to review the decision of the Court of Appeals and the judgment of that court should be reversed with instructions to vacate the judgment of the District Court and to direct that court to re-instate the original judgment in favor of petitioner, except only as to the nine acres of "corners" or "tips" over which Clean Water Act jurisdiction is no longer contested.

Respectfully submitted,

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July 11, 1995

APPENDIX A

LESLIE SALT CO., a Delaware corporation;
CARGILL, INC.,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,
Defendant-Appellee.

No. 93-15932

United States Court of Appeals
for the Ninth Circuit.

Appeal from the United States District Court
for the Northern District of California.
D.C. No. CV-85-8615-CAL
(Consolidated)
Charles A. Legge, District Judge, Presiding.

Argued and Submitted November 14, 1994
Filed May 22, 1995

OPINION

Before DONALD P. LAY,* HARRY PREGERSON, and DIARMUID O'SCANNLAIN, Circuit Judges.

* The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

O'SCANNLAIN, Circuit Judge:

We must decide whether to revisit an issue previously resolved by this court — whether isolated, seasonally dry intrastate waters used only by migratory birds are within the regulatory reach of the Clean Water Act. We also decide whether, in the event of violations of the Act, civil fines are mandatory or discretionary.

I.

Cargill, Inc., the corporate successor to Leslie Salt Co., owns a 153-acre tract of land southeast of San Francisco. The property abuts the San Francisco Bay National Wildlife Refuge and lies near Newark Slough, a tidal arm of San Francisco Bay. A road divides the property into a 143-acre parcel and a 10-acre parcel. Until 1959, Leslie Salt used the property for salt manufacturing. The eastern part of the 143-acre parcel still contains pits that were used to collect calcium chloride, and the western part contains shallow basins that were used for crystallizing salt.

This appeal centers on 12.5 acres out of the 143-acre parcel, on which the former crystallizers and calcium chloride pits still lie. During much of the year, these areas are dry. During the winter and spring, however, rainwater creates temporary ponds. Migratory birds use these ponds for habitat. The dispute in this case began in 1985, when Leslie Salt began digging a feeder ditch and a siltation pond on its property and began discharging fill that affected the seasonally ponded areas.

A.

Under the Clean Water Act ("the Act"), the discharge of any "pollutant" — which includes dredged or fill materials — into "navigable waters" is forbidden unless authorized by a permit issued by the Army Corps of Engineers (the "Corps"). 33 U.S.C. §§ 1311(a), 1344(a), 1362(12). "Navigable waters" is defined in the Act as "waters of the United States." 33 U.S.C. § 1362(7). The Act provides no further guidance as to what these terms encompass. The Corps has promulgated regulations defining "waters of the United States" as:

> (1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;
>
> * * *
>
> (3) All *other waters* such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, *the use, degradation or destruction of which could affect interstate or foreign commerce* including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are or could be used for industrial purposes by industries in interstate commerce;

33 C.F.R. § 328.3(a) (emphasis added). *See also* 40 C.F.R. § 230.3(s)(3) (EPA's identical definition).

In the preamble to the 1986 regulations, the Corps suggested that "waters of the United States" also includes waters:

> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. Which are or would be used as habitat by other migratory birds which cross state lines; or
>
> c. Which are or would be used as habitat for endangered species; or
>
> d. Used to irrigate crops sold in interstate commerce.

51 Fed. Reg. 41,217 (1986). This preamble material has never been subjected to notice-and-comment procedures and has not been promulgated as an official regulation. The predicate for jurisdiction over the seasonally ponded areas

still in dispute in this case is their status as "other waters" which are used as habitat by migratory birds.

B.

Upon learning that Leslie Salt was discharging fill that affected the seasonally ponded areas, the Corps issued a cease and desist order under section 404 of the Act. Leslie Salt filed suit challenging the Corps' jurisdiction over the property. The United States also brought an enforcement action, which was consolidated with Leslie Salt's suit.

The district court originally held that the Corps had no jurisdiction over Leslie Salt's property. *Leslie Salt Co. v. United States*, 700 F. Supp. 476 (N.D. Cal. 1989) ("*Leslie Salt I*"). On the issue that is currently before this court, the district court held that the temporary ponds in the crystallizers and the pits were not "other waters" under 33 C.F.R. § 328.3(a)(3), because they had been artificially created and were dry much of the year.

On appeal, this court reversed and remanded. *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990), *cert. denied*, 498 U.S. 1126, 112 L. Ed. 2d 1194, 111 S. Ct. 1089 (1991) ("*Leslie Salt II*"). The court held, among other things, that the fact that the crystallizers and pits were artificially made and dry part of the year did not exclude them from being "other waters." *See id.* at 359-60. The court also held that "the commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." *Id.* at 360. The court thus reversed and remanded for a factual determination of which parts of Leslie Salt's property had sufficient connections to interstate commerce to be subject to the Corps' jurisdiction under the Act.

On remand, the district court found that roughly 12.5 acres of seasonally ponded areas, primarily in the calcium chloride pits, were subject to jurisdiction. *Leslie Salt Co. v. United States*, 820 F. Supp. 478 (N.D. Cal. 1992) ("order for judgment") ("*Leslie Salt III*"). The court justified this holding by referring to the evidence summarized in the United States' Memorandum on Remand. *See id.* at 480. Among other things, this Memorandum states that some 55 species of migratory birds use the seasonally ponded areas as habitat. The court also held that Leslie Salt violated the Act in three of these areas by discharging fill or altering structures without a permit at specific points. Finally, in proceedings addressing the issue of remedies, the court ruled that penalties are mandatory under section 309(d) of the Act when a violation has been found, and that the United States was entitled to injunctive relief to restore the property to its preexisting condition. *See id.* at 483-84 ("order regarding remedies"). The parties subsequently stipulated to a penalty of $50,000 and a restoration plan. The stipulation preserved Cargill's right to appeal the issue of whether penalties are mandatory.

II.

Cargill urges this court to revisit the *Leslie Salt II* court's determination that the Corps' jurisdiction under the Act reaches isolated waters used only by migratory birds. Under law of the case doctrine, however, one panel of an appellate court will not reconsider matters resolved in a prior appeal to another panel in the same case. *Kimball v. Callahan*, 590 F.2d 768, 771 (9th Cir.), *cert. denied*, 444 U.S. 826, 62 L. Ed. 2d 33, 100 S. Ct. 49 (1979); 18 Wright & Miller, *Federal Practice & Procedure* § 4478, at 788 (1982). In the subsequent appeal, "the scope of review is narrowed to the limitations of the remand." *Adamian v. Lombardi*, 608 F.2d

1224, 1228 (9th Cir. 1979), *cert. denied,* 446 U.S. 938, 64 L. Ed. 2d 791, 100 S. Ct. 2158 (1980).

In *Leslie Salt II,* a panel of this court held that "the commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." 896 F.2d at 360. The court remanded only for a "factual determination of the sufficiency of the property's connections to interstate commerce." *Id.* at 361. Thus, the validity of the "migratory bird rule" was established in the first appeal, and this court's review should generally be limited to the issues decided on remand — the property's specific connections to interstate commerce due to migratory bird use. However, Cargill does not appeal the district court's factual findings.

Instead, Cargill first claims that this court should not apply law of the case because the panel in *Leslie Salt II* upheld the migratory bird rule in "a bare conclusion" and "without any discussion." Admittedly, a more detailed explanation for such a significant holding might have been more illuminating. However, Cargill's argument fails for two reasons. First, the panel's holding, though succinct, was addressed in a separate section of the opinion, specifically referred to the migratory bird examples in the preamble to the 1986 regulations, and was supported by citations to relevant case law. *Leslie Salt II,* 896 F.2d at 360. Judge Rymer's dissent in *Leslie Salt II* challenged the majority on precisely this point, which shows that the panel was aware of the issue. *See id.* at 361-62 n.1. Second, "even summarily treated issues become the law of the case." *Alliance for Cannabis Therapeutics v. DEA,* 15 F.3d 1131, 1135 (D.C. Cir. 1994). This court has followed law of the case even where the first panel's holding was "cryptic and somewhat ambiguous." *Hanna Boys Ctr. v. Miller,* 853 F.2d 682, 687 (9th Cir. 1988). *See also Christianson v. Colt Indus. Operating Corp.,* 486 U.S. 800, 817, 100 L. Ed. 2d 811, 108 S. Ct. 2166 (1988) ("The law of the case turns on whether a court previously decided upon a rule of law . . . not on whether, or how well, it explained the decision.").

The law of the case doctrine is not an absolute bar to reconsideration of matters previously decided. The doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger v. Anderson,* 225 U.S. 436, 444, 56 L. Ed. 1152, 32 S. Ct. 739 (1912). Thus, the court may reconsider previously decided questions in cases in which there has been an intervening change of controlling authority, new evidence has surfaced, or the previous disposition was clearly erroneous and would work a manifest injustice. *Merritt v. Mackey,* 932 F.2d 1317, 1320 (9th Cir. 1991); 18 Wright & Miller, § 4478, at 790.[1] Cargill's substantive arguments are essentially an attempt to show that this court's decision in *Leslie Salt II* was clearly erroneous. This court will address the merits of Cargill's claims only so far as necessary to determine whether the matter settled in *Leslie Salt II* should be reconsidered. *See Merritt,* 932 F.2d at 1320.

III.

Cargill makes several substantive and procedural challenges to the validity of the migratory bird rule. Because law of the case applies to these claims, Cargill must show not only that the *Leslie Salt II* court's holding regarding the

[1] The first two circumstances do not apply in this case. The evidence considered on remand was largely the same as the evidence in the first trial. Although Cargill claims the law has changed because the Corps has not subjected the migratory bird rule to notice and comment, this is actually just a continuation of the status quo. Regardless, it does not constitute controlling authority in this case.

migratory bird rule was wrong, but that it was clearly wrong. *See Merritt*, 932 F.2d at 1322.

A.

Cargill claims that the preamble to the 1986 regulations promulgated a rule without notice and comment as required by the Administrative Procedure Act. 5 U.S.C. § 553. It is undisputed that the preamble has not been subjected to notice and comment.

The *Leslie Salt II* court did not expressly address this claim in its opinion. However, the briefs and other materials submitted to that court reveal that it was aware of both the arguments and the cases relied upon by Cargill. "The law of the case applies to 'issues decided explicitly or by necessary implication in this court's previous disposition.'" *Hanna Boys Ctr.*, 853 F.2d at 685 (quoting *Liberty Mutual Ins. Co. v. EEOC*, 691 F.2d 438, 441 (9th Cir. 1982)). By holding that use by migratory birds could form a sufficient connection to interstate commerce to support jurisdiction, the *Leslie Salt II* court implicitly rejected all arguments that the rule is invalid for procedural reasons under the Administrative Procedure Act as well.

The merits of Cargill's claim turn on whether the migratory bird examples in the preamble are characterized as a substantive rule or an interpretive rule. A substantive rule is one that imposes "general, extra-statutory obligations pursuant to authority properly delegated by the legislature." *Alcaraz v. Block*, 746 F.2d 593, 613 (9th Cir. 1984) (quotation omitted). An interpretive rule is one that merely explains "what the administrative officer thinks the statute or regulation means." *See id.* at 613. A substantive rule must be subjected to notice and comment procedures, 5 U.S.C. § 553, but an interpretive rule need not. *Id.* at § 553(b)(3)(A).

The United States contends that the migratory bird examples are an interpretive rule because they merely set out the Corps' understanding of the statutory term "waters of the United States." The United States gains support for its position from *Hoffman Homes, Inc. v. EPA*, 999 F.2d 256, 261 (7th Cir. 1993), in which the Seventh Circuit held that it was reasonable for the EPA to interpret 40 C.F.R. § 230.3(s)(3) as allowing migratory birds to form the connection between "other waters" and interstate commerce.[2] The court noted that millions of dollars are spent on hunting, trapping, and observing migratory birds, and that the destruction of wetlands impinges on that commerce. *See id.* at 261. By holding that the "other waters" regulation could be read to encompass waters used by migratory birds, the court implicitly treated this as a reasonable interpretation of the statutory term "waters of the United States." By analogy, the migratory bird examples in the preamble could also be seen as merely an interpretation of the Act as opposed to a substantive addition to its reach.

If this court were deciding the issue for the first time, a much more detailed examination of the migratory bird rule's effect on agency decisionmaking might be in order. *See, e.g., Mada-Luna v. Fitzpatrick*, 813 F.2d 1006, 1016 (9th Cir. 1987). The court would also have more leeway in its final characterization of the rule. *See, e.g., Tabb Lakes, Ltd. v. United States*, 715 F. Supp. 726, 729 (E.D. Va. 1988) (holding "migratory bird rule" invalid as a substantive rule promulgated without notice and comment), *aff'd*, 885 F.2d 866 (4th Cir. 1989). However, at this point in the proceedings, the court may address the merits of Cargill's claims only so far as necessary to determine whether the *Leslie*

[2]The EPA and the Corps have concurrent jurisdiction to enforce the Act. 40 C.F.R. § 230.3(s)(3), promulgated by the EPA, is identical to 33 C.F.R. § 328.3(a)(3), which was promulgated by the Corps and is at issue in this case.

Salt II court was clearly wrong. *See Merritt,* 932 F.2d at 1320. Given that it is plausible to find that the preamble is merely an interpretive rule, and thus not subject to the notice-and-comment requirements of the Administrative Procedure Act, the holding in *Leslie Salt II* cannot be deemed clearly erroneous on this ground.

B.

Cargill claims that the Corps' interpretation of the Act to extend jurisdiction to habitat used by migratory birds is unreasonable. Cargill attempts to relitigate the *Leslie Salt II* court's holding that: "the Clean Water Act[ ] is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds . . . ." *Leslie Salt II*, 896 F.2d at 360. Indeed, Judge Rymer's dissent took issue with this part of the holding. *See id.* at 361 n.1. However, the existence of a dissent, though it may heighten our concerns, does not compel the court to conclude that the decision in *Leslie Salt II* was incorrect. *See Merritt,* 932 F.2d at 1321-22.

Cargill's claim turns on whether the preamble's example of waters "which are or would be used as habitat by other migratory birds which cross state lines," 51 Fed. Reg. 41,217 (1986), can be seen as a reasonable interpretation of the Act's term "waters of the United States," 33 U.S.C. § 1362(7). "An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 131, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985) (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel,* 467 U.S. 837, 842-45, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)).

The reasonableness of the Corps' interpretation must be judged in light of the Act's language, policies, and legislative

history. The language of the Act evinces broad congressional purposes that can be cited in support of the Corps' interpretation. For example, section 1251(a)(2) states that it is one of the Act's goals and policies to "provide[ ] for the protection and propagation of fish, shellfish, and wildlife." Similarly, section 1343(c)(1) instructs the EPA, in its formulation of guidelines for determining what constitutes degradation of waters, to consider "the effect of disposal of pollutants on . . . fish, shellfish, [and] wildlife." There is no suggestion in the language of the Act that isolated waters used only by migratory birds fall within its ambit. Nevertheless, the Act's policy of protecting wildlife could plausibly be read to stretch this far.

Clearly the Act fails to mention isolated wetlands. And, to the extent it is relevant, neither does the Act's legislative history from 1972 and 1977. However, legislative history from 1972 asserts Congress's intent to extend Act jurisdiction over waters of the United States to the maximum extent possible under the Commerce Clause. S. Rep. No. 1236, 92nd Cong., 2d Sess. 144 (1972). *See also Rueth v. EPA,* 13 F.3d 227, 231 (7th Cir. 1993) (noting "Congress's intent to make the Clean Water Act as far-reaching as the Commerce Clause permits").

The Corps' interpretation also finds some support in the Supreme Court's analysis of the Act. In *United States v. Riverside Bayview Homes, Inc.,* 474 U.S. 121, 131-35, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985), the Court held that it was reasonable for the Corps to exercise jurisdiction over wetlands *adjacent* to other waters. The Court cited with apparent approval the Corps' findings that "wetlands . . . may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water." *Id.* at 135. The Court also referred to the Corps' assessment that "adjacent wetlands may serve significant natural biological functions,

including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic . . . species." *Id.* at 134-35 (quotation omitted). These statements applied to adjacent wetlands, not to isolated, seasonally ponded areas as are at issue in this case. *See id.* at 131 n.8. The seasonally ponded areas on Cargill's property have no hydrological connection to any other body of water; indeed, for much of the year they do not even exist. Nevertheless, the Corps' rationale for regulating adjacent wetlands may have some application to isolated waters as well. The seasonally ponded areas may have a connection to the aquatic ecosystem in their role as habitat for migratory birds.

Finally, as discussed above, the Seventh Circuit's decision in *Hoffman Homes* supports the notion that it is reasonable to interpret the Act as allowing migratory birds to be the connection between a wetland and interstate commerce. *Hoffman Homes,* 999 F.2d at 261. *See also Utah v. Marsh,* 740 F.2d 799, 803 (10th Cir. 1984) (holding that a lake's presence "on the flyway of several species of migratory waterfowl" was one factor among several supporting Act jurisdiction).

If this court were considering the issue for the first time, Cargill's arguments might well deserve closer consideration. However, in light of the broad purposes evinced by the language of the Act and, to a greater extent its legislative history, and the tangential support found in other cases, the holding in *Leslie Salt II* cannot be considered clearly erroneous on this ground.

C.

Cargill claims that, if the migratory bird rule is held to be a reasonable interpretation of the Act, then it would exceed Congress's powers under the Commerce Clause. Again, this is an attempt to relitigate the *Leslie Salt II* court's holding that "the commerce clause power . . . is broad enough to

extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." *Leslie Salt II,* 896 F.2d at 360. Even Judge Rymer, in dissent, agreed that the commerce power can reach regulation of migratory bird habitat; she argued instead that Congress did not intend to extend Act jurisdiction to such an extent. *Id.* at 361 n.1.

A court's review of congressional enactments under the Commerce Clause should be highly deferential. *United States v. Evans,* 928 F.2d 858, 862 (9th Cir. 1991). "Activity that is seemingly insignificant may be regulated [under the Commerce Clause] where one individual's 'contribution, taken together with that of many others similarly situated, is far from trivial.' " *Columbia River Gorge United v. Yeutter,* 960 F.2d 110, 113 (9th Cir.) (quoting *Wickard v. Filburn,* 317 U.S. 111, 127-28, 87 L. Ed. 122, 63 S. Ct. 82 (1942)), *cert. denied,* 113 S. Ct. 184 (1992).

One rationale for regulating migratory bird habitat as an element of interstate commerce was expressed by the Seventh Circuit in *Hoffman Homes:* "Throughout North America, millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds. Yet the cumulative loss of wetlands has reduced populations of many bird species and consequently the ability of people to hunt, trap, and observe those birds." *Hoffman Homes,* 999 F.2d at 261.

The Supreme Court has suggested that Congress's commerce clause powers extend to the regulation of migratory birds. In *Hughes v. Oklahoma,* 441 U.S. 322, 329-36, 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979), the Court impliedly said as much when it held that state regulations of intrastate wildlife fall within the ambit of the dormant Commerce Clause. Other courts have also found that the Commerce Clause extends this far. In *Palila v. Hawaii Department of Land and Natural Resources,* 471 F. Supp. 985, 995

(D. Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981), the court, in upholding the Endangered Species Act against a Commerce Clause challenge, stated that "a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species."

The migratory bird rule certainly tests the limits of Congress's commerce powers and, some would argue, the bounds of reason. In this case, there is no evidence of human contact with the seasonally ponded areas. The only humans that hunt or photograph the birds using these ponds apparently are doing so after they have reached other locations. Nevertheless, given the broad sweep of the Commerce Clause, the holding in *Leslie Salt II* cannot be considered clearly erroneous on this ground.[3]

We conclude that reconsideration of *Leslie Salt II* by this panel is inappropriate.

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[3]Cargill also claims that Congress unconstitutionally delegated its legislative powers to the Corps. The vitality of the nondelegation doctrine is questionable, and in the case of the Act, Congress merely left it up to the implementing agencies to define the term "waters of the United States." In light of the underlying policies expressed in the Act, this is more than the mere "intelligible principle" required to uphold a delegation of legislative power. *Mistretta v. United States*, 488 U.S. 361, 377, 102 L. Ed. 2d 714, 109 S. Ct. 647 (1989). *See also Mills v. United States*, 36 F.3d 1052, 1056 (11th Cir. 1994) (rejecting nondelegation challenge to the Act).

IV.

PREGERSON, Circuit Judge, with whom LAY, Circuit Judge, concurs:

We concur in Judge O'Scannlain's opinion as to Parts I through III. However, we deliver the opinion of the Court as to Part IV, addressing the issue of whether civil penalties are mandatory under section 309(d) of the Act.

Cargill claims the district court erred when it held that section 309(d) of the Act mandates that a civil penalty be imposed for Cargill's violations. See *Leslie Salt III*, 820 F. Supp. at 483-84.

Section 309(d) provides:

> Any person who violates [one of the enumerated provisions of the CWA] *shall be subject to a civil penalty* not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, . . . any good-faith efforts to comply with the applicable requirements, . . . and such other matters as justice may require.

33 U.S.C. § 1319(d) (emphasis added). The question of whether the Act mandates civil penalties is a question of statutory construction reviewed de novo by this court. *United States v. Richison*, 901 F.2d 778, 780 (9th Cir. 1990).

This is an issue of first impression before this court. "In construing statutes in a case of first impression, we first look to the language of the controlling statutes, and second to legislative history." *Central Mont. Elec. Power Coop. v. Administrator of Bonneville Power Admin.*, 840 F.2d 1472, 1477 (9th Cir. 1988). "Absent a clearly expressed legislative intent to the contrary, the plain language must ordinarily be regarded as conclusive." *Id.*

The language of section 309(d) is somewhat odd in that it uses the words "shall be subject to" instead of saying "shall pay." At first glance, this would seem to mean that while violators are subject to penalty, they may or may not be fined — that is, penalties are discretionary with the district court. However, the Fourth and Eleventh Circuits have held that the use of the words "shall be subject to" means that civil penalties are mandatory under section 309(d). *See Atlantic States Legal Found. v. Tyson Foods, Inc.*, 897 F.2d 1128, 1142 (11th Cir. 1990) ("This language makes clear that once a violation has been established, some form of penalty is required."); *Stoddard v. W. Carolina Regional Sewer Auth.*, 784 F.2d 1200, 1208 (4th Cir. 1986) ("This language leaves little doubt that, under the circumstances of this case, a penalty in some form is mandated.").

We agree with the other circuits that have held that civil penalties are mandatory under section 309(d). First, as a matter of statutory interpretation, a longstanding canon holds that the word "shall" standing by itself is a word of command rather than guidance when the statutory purpose is the protection of public or private rights. *Escoe v. Zerbst*, 295 U.S. 490, 494, 79 L. Ed. 1566, 55 S. Ct. 818 (1935) (Cardozo, J.). The Act serves precisely such purposes. Second, Congress used less definitive language when it wanted to indicate that penalties are discretionary. Shortly after section 309(d), in section 309(g)(1), Congress used the words "*may* . . . assess a . . . civil penalty" with regard to administrative actions. 33 U.S.C. § 1319(g)(1) (emphasis added). If Congress had intended civil penalties under section 309(d) to be discretionary, it would have used the word "may" instead of "shall be subject to."

Finally, the fact that civil penalties are mandatory under section 309(d) does not restrain a district court's discretion as significantly as Cargill suggests. District courts retain the broad discretion to set a penalty commensurate with the

defendant's culpability. Indeed, in its consideration of the seriousness of a defendant's violations and "such other matters as justice may require," the district court could assess a civil penalty of only a nominal amount.

V.

In sum, we affirm the district court's "order on judgment" on the ground that law of the case bars reconsideration of the validity of the migratory bird rule and that Cargill's challenges to this rule do not demonstrate that the holding of the prior appeal was clear error. To do otherwise would too lightly regard the decision of another panel of this court. Only an en banc court may alter such outcome.

We also affirm the "order regarding remedies" to the extent that it held that civil penalties are mandatory under section 309(d) of the Act.

AFFIRMED.

O'SCANNLAIN, Circuit Judge, dissenting in part:

I respectfully dissent from Part IV of the majority opinion.

Section 309(d) of the Clean Water Act ("the Act") provides:

> Any person who violates [one of the enumerated sections of the Act] shall *be subject* to a civil penalty not to exceed $25,000 per day for each violation.

33 U.S.C. § 1319(d) (emphasis added). The majority reads this language to mean that civil penalties are mandatory for proven violations of the Act. If section 309(d) had provided "Any person who violates . . . shall *pay* a civil penalty," I would readily agree with the majority's interpretation. However, it does not so provide, and we cannot ignore the three

words following the word "shall." To do otherwise "violates the settled rule that a statute must, if possible, be construed in such a fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 35, 117 L. Ed. 2d 181, 112 S. Ct. 1011 (1991).

Section 309(d) did not use the words "shall pay"; it used the words "shall be subject to." The latter phrase is synonymous with "shall be liable to" or "shall be answerable to." *Black's Law Dictionary* 1278 (5th ed. 1979). Read literally, the section merely states that a violator is liable to be assessed a civil penalty, not that he or she must be. In other words, civil penalties are discretionary. Several district courts facing this question have come to this conclusion as well. *See, e.g., Hawaii's Thousand Friends v. Honolulu,* 149 F.R.D. 614, 617 (D. Haw. 1993); *United States v. Bradshaw,* 541 F. Supp. 880, 883 (D. Mass. 1981). *See also United States v. Winchester Mun. Util.,* 944 F.2d 301, 306 (6th Cir. 1991) (suggesting that district courts that found civil penalties discretionary are correct).

If Congress had meant civil penalties to be mandatory, it could have written section 309(d) to state that a violator "shall pay" a civil penalty. Indeed, these are precisely the words it has chosen in numerous civil penalty provisions. *See, e.g.*, 7 U.S.C. § 1596(a) ("Any person who . . . violates any provision of this chapter . . . *shall pay* a fine of not more than $1,000 . . .") (emphasis added); 26 U.S.C. § 6038(b)(1) ("If any person fails to furnish . . . any information . . . required under [this section], such person *shall pay* a penalty of $1,000 . . .") (emphasis added).

In addition, to the extent it might be relevant, the Act's legislative history reveals no congressional intent whatsoever to make civil penalties mandatory. The House Report to the 1972 Amendments simply states that "the courts are *authorized* to apply appropriate civil penalties under Section 309(d)." H.R. Rep. No. 911, 92nd Cong., 2d Sess. 133

(1972) (emphasis added). It does not suggest that Congress believed the courts are required to do so.

Even if section 309(d) were found to be ambiguous, the rule of lenity should counsel us to choose the interpretation least likely to impose penalties unintended by Congress. *See National Org. for Women, Inc. v. Scheidler,* 127 L. Ed. 2d 99, 114 S. Ct. 798, 806 (1994). The rule of lenity has not been limited to criminal statutes, particularly when the civil sanctions in question are punitive in character. *See United States v. Thompson/Center Arms Co.,* 504 U.S. 505, 112 S. Ct. 2102, 2110 n.10, 119 L. Ed. 2d 308 (1993). The penalties contemplated by section 309(d) clearly have punitive purposes. *Tull v. United States,* 481 U.S. 412, 422-23, 95 L. Ed. 2d 365, 107 S. Ct. 1831 (1987). Thus, section 309(d) should not be read to require civil penalties in all cases but only where the district court, in its discretion, finds them appropriate.

Undoubtedly, civil penalties will be imposed in most cases of proven violations of the Act; however, by leaving them to the district court's discretion, more appropriate remedies may be fashioned in exceptional cases. For example, the district court may encounter situations in which the purposes of the Act are better served by seeing to it that the violator undertakes comprehensive corrective actions. *See, e.g., Gwaltney v. Chesapeake Bay Found.,* 484 U.S. 49, 60-61, 98 L. Ed. 2d 306, 108 S. Ct. 376 (1987) (suggesting that civil penalties might be inappropriate where violator agrees to take some extreme corrective action).

I would therefore reverse the district court's "order regarding remedies" to the extent that it held that section 309(d) of the Act mandated that a civil monetary penalty be imposed for every violation of the Act.

APPENDIX B

LESLIE SALT CO., a Delaware corporation,
Plaintiff,

v.

UNITED STATES OF AMERICA, et al.,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

v.

LESLIE SALT CO., a Delaware corporation, et al.,
Defendants.

Nos. C-85-8615-CAL and C-86-4187-CAL
(Consolidated)

In the United States District Court
for the Northern District of California

Filed April 26, 1993

FINAL JUDGMENT

LEGGE, District Judge:

These consolidated cases were tried before the Court, sitting without a jury, and were argued and submitted for decision following briefing. Plaintiff and Defendants, Leslie Salt Co. and Cargill, Incorporated (hereinafter referred to as "Cargill") were represented by Edgar B. Washburn of Washburn, Briscoe & McCarthy. The Defendants and Plaintiff, United States of America, John O. Marsh, Lt. General E.R. Heiberg, and Lt. Col. Andrew M. Perkins (collectively referred to as the "United States") were represented by Letitia J. Grishaw and Scott A. Schachter of the United States Department of Justice. The Save San Francisco Bay Association and the National Audubon Society were granted leave to intervene as Defendants in No. C-85-8615, and were represented by Winifred A. Berman of Shute, Mihaley & Weinberger.

The Court entered a judgment on October 27, 1988. The United States timely appealed that judgment to the United States Court of Appeals for the Ninth Circuit. That court issued its decision reversing in part and remanding the case on February 6, 1990. *See Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990).

Following Cargill's unsuccessful petition for rehearing or rehearing *en banc* and petition for a writ of certiorari, further proceedings were had in this Court in accordance with the remand. These proceedings were had on the record of the original trial, together with additional briefing and argument. On January 6, 1992, this Court entered an order for judgment upon remand.

Following this Court's order for judgment, further proceedings were had concerning remedies sought by the United States. On July 22, 1992, this Court, after having heard oral argument and having been fully briefed and advised in the premises, entered an order regarding remedies.

Based upon the record of the original trial and that of the proceedings on remand, in light of the court of appeals' decision, and the Court having heard and reviewed the testimony of the witnesses, the designated deposition transcripts, the exhibits, the designated responses, the entire record of the case, and being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Those portions of Cargill's Parcel 10 and Parcel 143 of the Newark Coyote property marked and cross-hatched on the map attached hereto as Exhibit A are subject to the

jurisdiction of the U.S. Army Corps of Engineers under section 404 of the Clean Water Act. No other portions of the Newark Coyote property are subject to the jurisdiction of that Act.

2. The Rivers and Harbors Act of 1899 does not apply to the Newark Coyote property, and Cargill did not violate the Rivers and Harbors Act.

3. Cargill violated sections 301 and 404 of the Clean Water Act at the points marked "A1" and "A2" on Exhibit A.

4. Cargill also violated sections 301 and 404 of the Clean Water Act at points "B" and "C" on Exhibit A.

5. Section 309(d) of the Clean Water Act requires that penalties be imposed in this case — in other words, the Court has no discretion in that regard in this case. The same statute vests wide discretion in the Court in setting the amount of such penalties. Without waiving, and expressly reserving any rights to appeal this Court's orders of January 6, 1992, and July 22, 1992, and any judgment entered herein, Cargill and the United States stipulated in the Stipulation Re amount of Penalty and Terms of Restoration Plan entered into by the parties, that the amount of the civil penalty is $50,000. The Court finds that a $50,000 civil penalty is supported by the entire record in this case and is consistent with section 309(d) of the Clean Water Act. Cargill shall pay a civil penalty forthwith in that amount.

6. The United States is entitled to injunctive relief which restores the property at the points of violation to essentially their pre-existing condition. Without waiving, and expressly reserving any rights to appeal this Court's orders of January 6, 1992, and July 22, 1992, and any judgment entered herein, Cargill and the United States stipulated in the Stipulation Re Amount of Penalty and Terms of Restoration Plan entered into by the parties, that the restoration is to be

performed in accordance with the terms of the restoration plan set forth in Exhibit B to this Final Judgment. The Court finds that the stipulated restoration is appropriate given all of the facts and circumstances in this case. Cargill shall perform the restoration in accordance with the terms and conditions of Exhibit B.

7. The United States is also entitled to an injunction restraining future violations at those points where the Court found that there were violations of the Clean Water Act. Those points are identified on Exhibit A. The United States is not entitled to an injunction that goes beyond that scope. Cargill is hereby restrained from future violations at those points.

8. Cargill is not entitled to an injunction against the Corps restraining the prospective exercise of its regulatory jurisdiction.

9. The Court vacates its January 4, 1989, award of costs to Cargill. Costs, including attorneys' fees, are not to be awarded to either side.

10. The Court retains jurisdiction in this case to ensure compliance with the terms of this Final Judgment. This final judgment, upon entry after compliance by the United States with the notice and comment provisions in 28 C.F.R. § 50.7 (1992), is the final judgment resolving all issues in this litigation, including civil penalties and injunctive relief.

EXHIBIT A

EXHIBIT B

Cargill shall restore the Newark Coyote property at the points of violation determined by the Court in the January 6, 1992 Order to essentially their preexisting condition, as set forth below.

Cargill shall complete the restoration work described below within 90 days after entry of the Final Judgment.

Restoration of Former Crystallizer (designated as area A in the Court's January 6, 1992 Order):

a. Cargill shall backfill the feeder ditches and siltation basin with clean fill to the pre-violation contour;

b. Cargill shall construct a berm around the entire jurisdictional area in a safe manner, in accordance with generally accepted engineering standards, practices and specifications, outside the jurisdictional boundary;

c. The berm shall be at least one foot in elevation higher than the highest point in the jurisdictional area and shall be constructed and maintained so as to avoid erosion;

d. Cargill shall divert a sufficient amount of water into the bermed area to ensure at least 21 consecutive days of ponding each winter (unless that is impossible due to drought);

e. Any intake and/or spillway structures shall be constructed so as to prevent erosion; and

f. The United States assumes no responsibility for any injury or damage caused by or resulting from the restoration work.

Restoration of the 1988 Bulkhead (designated as Area C in the Court's January 6, 1992 Order):

g. Cargill shall remove the concrete bulkhead and tidegate and return the area to its pre-violation contour;

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h. Any cofferdam needed to perform this restoration work for the bulkhead shall be made of sandbags and all materials shall be removed within five (5) days of completion of the restoration work on this bulkhead; and

i. The United States assumes no responsibility for any injury or damage caused by or resulting from the restoration work.

An individual permit under section 404(a) of the CWA, 33 U.S.C. § 1344(a), shall not be required for performance of the restoration work. The restoration work is authorized by Nationwide Permit No. 32, 33 C.F.R. Pt. 330, App. A (1992). Cargill shall comply with all of the terms and conditions for Nationwide Permit No. 32 in performing the restoration work, including, but not limited to, the obligation to obtain state water quality certification under section 401 of the CWA (or a waiver from that requirement).

Within thirty (30) days after completion of the restoration work, Cargill shall notify the United States Department of Justice in writing. The Corps and Cargill shall then jointly schedule an inspection by the Corps to determine whether the restoration has been successfully completed. Such inspection shall take place within thirty (30) days of the United States' receiving the notice specified above. After such inspection, the Corps shall have fifteen (15) business days to disapprove the restoration work. If the Corps disapproves, it shall set forth its objection in writing to Cargill. Failure to timely object shall be deemed approval. If the Corps should object, as provided herein, Cargill shall have fifteen (15) days to correct any deficiency or submit the matter for resolution by the Court.

APPENDIX C

LESLIE SALT CO., a Delaware corporation,

v.

UNITED STATES OF AMERICA; JOHN O. MARSH, et al.

UNITED STATES OF AMERICA,

v.

LESLIE SALT CO., a Delaware corporation;
CARGILL INC., a Delaware corporation.

Nos. C-85-8615-CAL and C-86-4187-CAL

United States District Court,
N.D. California

January 6, 1992
Order Regarding Remedies July 22, 1992

ORDER FOR JUDGMENT

LEGGE, District Judge:

These consolidated cases are before this court on remand from the United States Court of Appeals for the Ninth Circuit. *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990) *cert. denied*, 498 U.S. 1126, 111 S. Ct. 1089, 112 L. Ed. 2d 1194 (1991). This court was directed to make two determinations on remand. One is whether the former salt crystallizers and calcium chloride pits on the property have a sufficient connection with interstate commerce to be under the jurisdiction of the Clean Waters Act as "other waters" of the United States. *Id.* at 360. Second, the appellate court determined that some of Leslie's property met the standards for jurisdiction under the Clean Water Act. But because

that jurisdiction did not extend to all of the property, the Ninth Circuit remanded for a determination by this court of the portions of property which are subject to the jurisdiction of the act. *Id.* at 360-61.

I.

After remand, the parties agreed that these decisions would be made based upon the transcript of the first trial, together with certain additional briefs and exhibits, without the necessity for additional testimony. The parties then filed designations of the exhibits, the transcript references which they believed to be relevant and material, further briefs, and maps of the property showing their contentions about the extent of jurisdiction. They agreed that some portions of the property were within or without Clean Water Act jurisdiction, but some remained disputed. Oral argument was held and the case was submitted for decision.

II.

This court has reviewed the opinion of the Ninth Circuit, the transcript of the first trial, the exhibits designated by the parties, the briefs of the parties, and the maps submitted by the parties. This order, together with the map which has been drawn by the court and is attached to this order, constitutes the findings of fact and conclusions of law of this court pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. The findings are made by a preponderance of the evidence.

The maps submitted by the parties contain irregular shapes, and can only be compared with one another by the use of overlays. The portions of the property cannot be described verbally, either by reference to plot numbers, acreage or metes and bounds. Visual rather than verbal delineations are therefore necessary. For that reason, this

court's decisions as to the portions of Leslie's property that are subject to Clean Water Act jurisdiction are delineated on the attached map.

III.

Decisions regarding the extent of "other waters" of the United States require a two-step process.

First, the court must determine the areas that are ponded. The Ninth Circuit said that, "The Corps' determination that the crystallizers and calcium chloride pits are . . . seasonal bodies of water within the meaning of the regulations is proper." *Leslie Salt Co.*, 896 F.2d at 360. However, the crystallizers are large geographic bodies, and the Court of Appeals did not state or imply that because seasonal waters must be considered, the entire crystallizers must be included. Indeed, the whole point of the remand was for this court to determine the portions of the property over which the Corps had jurisdiction in view of the circuit's legal conclusions. *Id.* at 361. And on remand the Corps does not contend that all of the crystallizers are subject to jurisdiction. This court's responsibility is to accept that seasonal waters meet the jurisdictional requirement, but nevertheless to determine where those seasonal waters are.

The second step is to determine whether those areas have a sufficient tie to interstate commerce, because of their use as a habitat by migratory birds or other endangered species. *Id.* at 360. On remand, Leslie made certain concessions regarding which areas were ponded, primarily in the calcium chloride pits, but did not concede that those areas were "other waters."

This court has delineated on the map attached to this order the areas of the crystallizers and calcium chloride pits which it concludes meet the Ninth Circuit's test of "seasonal bodies of water." And this court finds that based upon

the evidence presented, those areas have a connection to interstate commerce as defined in 51 C.F.R. §§ 41206, 41217 (1990). That evidence need not be discussed in this order, but is summarized in the United States' Memorandum on Remand, filed June 28, 1991, pp. 22-24.

IV.

This court's findings regarding the portions of the property that are subject to the jurisdiction of the Clean Water Act as being "wetlands" are marked on the attached map.

A few comments are necessary. Leslie concedes that the area identified as Zone "P" is a wetland. And the court finds that certain other areas are wetlands. But the court finds that certain areas on the map submitted by the Corps are not wetlands. These findings are based on the evidence of the extent of water, the soil hydrology and the nature and extent of the vegetation. These factors were discussed in *Leslie Salt Co.*, 700 F. Supp. at 486-89, and need not be repeated here.

V.

Having determined the extent of the jurisdiction of the Clean Water Act over Leslie's property, this court next turns to the issues of Leslie's alleged violations of that act.

A.

'The Corps also argues that Leslie violated the Rivers and Harbors Act at point "B" on the map. However, that argument is contrary to the record and the law of this case. After the first trial, this court found that Leslie did not violate the Rivers and Harbors Act; *Leslie Salt Co. v. United States*, 700 F. Supp. 476, 482 (N.D. Cal. 1988), *rev'd on*

other grounds, 896 F.2d 354 (9th Cir. 1990), *cert. denied* 498 U.S. 1126, 111 S.Ct. 2089, 112 L. Ed. 2d 1194 (1991). The Court of Appeals did not upset, or indeed directly discuss, that finding. Instead, the Court of Appeals remanded the case to this court for a determination of jurisdiction under the Clean Water Act, *Leslie Salt Co.*, 896 F.2d at 360-61. The court therefore declares that Leslie is not in violation of the Rivers and Harbors Act at point "B."

B.

The Corps contends that Leslie violated the Clean Water Act by the construction of ditches and the movement of fill at points designated as "A" on the map. Those actions occurred in October of 1985, and consisted of the construction of feeder ditches and basins. The court has found on the map that two of the area "A's" which the court has marked "A1" and "A2," are subject to Clean Water Act jurisdiction. The court finds that Leslie's activities at those points were violations of section 301(a) of the Clean Water Act. Leslie discharged "fill" in those areas which are now found to be subject to the jurisdiction of the Act. "Fill" is a defined pollutant. And Leslie did so without obtaining a permit as required by section 404 of the Act.

C.

The Corps contends that Leslie violated the Clean Water Act in December of 1986 at point "B" on the map. It is undisputed that Leslie attempted to block a culvert at that point and did so without a permit. This court has determined that that area is subject to the jurisdiction of the Clean Water Act. And the Ninth Circuit has already determined that this area is connected to the Newark Slough. *Leslie Salt Co.*, 896 F.2d at 358-59. Leslie's activities on the "water" side of the culvert are within the prohibitions of the act.

Leslie contends that its placement of plywood and sandbags to stop the flow of water in that culvert was exempt from the permit requirements of the Act. The claimed exemptions are found in the Clean Water Act, Sections 404(f)(1)(B)(C); 33 C.F.R. § 323.4(a)(2) (1990). These exemptions allow the maintenance of existing structures and the maintenance of drainage ditches. The Ninth Circuit has held that such exemptions are to be narrowly construed. *United States v. Akers*, 785 F.2d 814, 819, 823 (9th Cir. 1986). The court finds that the activities of Leslie in blocking the flow of water through the culvert was not the maintenance of an existing structure or the maintenance of a drainage ditch. And even if those activities were initially exempt, the "recapture" provision of the Clean Water Act would preclude these defenses. Section 404(f)(2) of the Act precludes the exemption of those activities which bring about a "change in use." A change in use would occur when a section 404 wetland is converted to a non-wetland. 33 C.F.R. § 323(4)(C) (1990). The areas onto which the water flowed have now been delineated as wetlands. The purpose of blocking the culvert was to prevent the flow of water onto that wetland. That would bring about a change and would be subject to jurisdiction.

D.

In 1988 Leslie constructed a large bulkhead on the bird refuge side of point "C" on the map. This included a concrete bulkhead and a tide gate, designed to control the flow of water through the culvert onto Leslie's property. The area onto which the water flows is designated as area "P" on the map, and is an area which Leslie concedes is within the jurisdiction of the act.

The activity occurred in 1988, after this court entered the judgment in the first trial. This issue was not then submitted to this court for decision, and of course no decision was

made by the Court of Appeals. The government seeks to amend its complaint to include this alleged violation, and at oral argument Leslie consented to allow it to be considered.

Leslie concedes that its activity occurred in jurisdictional wetlands. But Leslie argues that (1) it was the replacement of a prior tide gate, and was hence exempt from jurisdiction and the Corps' regulations, and (2) that the construction was not a prohibited discharge. The Corps objected to consideration of these defenses. But since the events are subsequent to the original judgment, and the alleged violation is to be considered, Leslie's defenses should also be considered on the merits.

However, this court finds against Leslie on the merits of these defenses. This activity was the construction of a new tide gate south of the culvert, and not the maintenance of the existing tide gate north of the culvert. A new area was affected by Leslie's construction work. And further, the recapture provision discussed above precludes the exemption defenses. *Akers*, 785 F.2d at 822. The court also finds that the installation of the tide gate was the placement of a pollutant. The side-casting and redeposit of excavated wetlands, and the pouring of concrete, would constitute the discharge of a pollutant. 33 U.S.C. § 1362(6) (1990). The court therefore concludes that Leslie violated the Clean Water Act at point "C".

VI.

This court therefore finds, concludes, and declares as follows:

1. Those portions of Leslie's property marked on the attached map are subject to the jurisdiction of the Clean Water Act, and no other portions of the property are subject to the jurisdiction of that act.

2. The Rivers and Harbors Act does not apply to the property, and Leslie did not in [sic] violate the Rivers and Harbors Act.

3. Leslie violated the Clean Water Act at the points marked "A1" and "A2" on the map.

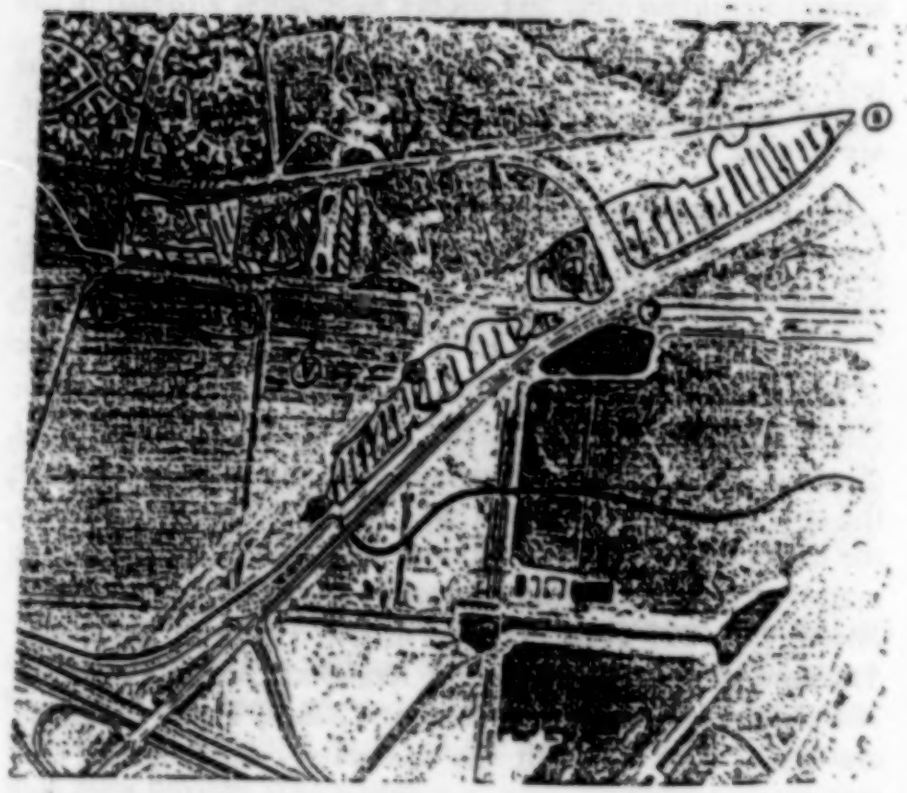
4. Leslie violated the Clean Water Act at point "B."

5. Leslie violated the Clean Water Act at point "C."

6. The court vacates it [sic] January 4, 1989 award of costs to Leslie. Costs will not be awarded to either side. Although the Corps has now established jurisdiction over certain portions of Leslie's land, it has not established jurisdiction over all of the property as it sought to do by the filing of this action.

7. A status conference will be held on February 7, 1992, at 11:00 a.m. for the purpose of considering the further proceedings that are necessary, including remedies.

APPENDIX



ORDER REGARDING REMEDIES

On January 6, 1992 this court entered an order determining those portions of Leslie's property that are subject to the jurisdiction of the United States under the Clean Water Act; determining that Leslie had violated the Clean Water Act at certain points on the property; and directing further proceedings on the issues of remedies. The parties made motions on the issues of remedies, and the motions were submitted to the court for decision. The court has reviewed

the motions, the records, the arguments of counsel, and the applicable authorities, and orders as follows:

1. Leslie asks that the court reconsider its decisions regarding certain violations. The requests for reconsideration are denied.

2. The motions present the issue of whether civil penalties under the Clean Water Act, 33 U.S.C. § 1319(d), *must* be imposed by this court, or whether this court has discretion to determine that *no* penalties should be assessed.

No Ninth Circuit case has decided this question. The Ninth Circuit cases cited to this court do discuss the subject of remedies, but have not decided the question of whether the civil penalties are mandatory. This court is persuaded by the decisions of two other circuits, holding that penalties are mandatory. *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.*, 897 F.2d 1128 (11th Cir. 1990) at 1142; and *Stoddard v. Western Carolina Regional Sewer Authority*, 784 F.2d 1200 (4th Cir. 1986) at 1208-9. These decisions are also consistent with the mandatory language of the statute.

3. The statute nevertheless vests wide discretion in this court in setting the amount of the penalties. The statute enumerates certain things to be considered, and adds "such other matters as justice may require." This court may ultimately conclude that some or all of the violations call for only minimal penalties. But that issue will unfortunately require another round of proceedings. This court has not considered the arguments regarding the alleged seriousness of the violations and the extenuating or mitigating circumstances. Those matters will be addressed when the United States makes an appropriate motion for specific penalties. The United States should file its motion by August 31, 1992.

4. The United States has directed some discovery to Leslie on the issue of penalties. However, those discovery

requests are extreme. We are dealing with property which has apparently undergone no development since this dispute arose. The vast majority of the property was held not to be subject to the jurisdiction of the Clean Water Act. And some of the evidence requested by the discovery was considered in the trial on the merits.

The court directs that when the United States files its motion for penalties, the United States also specify what discovery it believes is reasonable necessary. Leslie will then either supply that discovery or make its objections.

5. The United States is entitled to injunctive relief which restores the property at the points of violation to essentially their pre-existing condition. Leslie is to submit a plan to the Corps and to the court by August 31, 1992, which describes its proposed restorations.

6. The United States is also entitled to an injunction restraining future violations at those points where this court has found that there were violations of the Clean Water Act. However, the United States is not entitled to an injunction that goes beyond that scope.

7. Leslie's request for an injunction against the United States is denied. While this court would like to see the disputes between the Corps and Leslie with respect to this property put to rest for all time, this court does not have the power to enjoin an agency of the United States from prospective exercise of its claimed jurisdiction. This court will certainly look with disfavor on any attempts by the Corps to relitigate issues and conditions which have already been resolved. But the court cannot preclude the Corps from attempting to exercise its jurisdiction in the future if the conditions or the law change.

IT IS SO ORDERED.

APPENDIX D

LESLIE SALT CO., a Delaware corporation,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA, et al.,
Defendants,
and
SAVE SAN FRANCISCO BAY ASSOCIATION,
a non-profit California corporation;
NATIONAL AUDUBON SOCIETY,
a non-profit New York corporation,
Defendant-Intervenors-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

LESLIE SALT CO., a Delaware corporation;
and CARGILL, INC., a Delaware corporation,
Defendants-Appellees.

Nos. 89-15244, 89-15337

United States Court of Appeals,
Ninth Circuit.

DC Nos. CV-85-8615-CAL and CV-86-4187-CAL

Argued and Submitted November 16, 1989
Decided February 6, 1990

OPINION

Before FARRIS, PREGERSON, and RYMER, Circuit Judges.

FARRIS, Circuit Judge:

This is an appeal from a district court decision denying the Army Corps of Engineers jurisdiction under the Clean Water Act, 33 U.S.C. § 1251 et. seq., over a parcel of land near the San Francisco Bay. 700 F. Supp. 476. The Corps had sought to require the landowner to obtain a permit before draining and filling the land, which over many years had acquired some aquatic characteristics. The district court found that because these conditions were artificial and were in part caused by the government, the Corps lacked jurisdiction. We reverse and remand.

BACKGROUND

This dispute revolves around a 153 acre tract of undeveloped land south of San Francisco, called the Newark Coyote Property, owned by Leslie Salt. A road separates the property into two parcels, one of 143 acres ("parcel 143") and one of 10 acres ("parcel 10"). The property abuts the San Francisco National Wildlife Refuge and lies approximately one quarter mile from the Newark Slough, a tidal arm of the San Francisco Bay.

The present condition of the property, or rather its condition in late 1985 through 1986 when the Corps claimed jurisdiction, is the result of many artificial changes to the property over the last 100 years. Originally the property was pasture land. The first change occurred early in this century, when Leslie's predecessors in interest constructed facilities for the manufacture of salt. They excavated pits on the

eastern one-third of parcel 143 for depositing calcium chloride, and created large, shallow, water-tight basins on the western two-thirds for crystallizing salt. Salt production on the property effectively stopped in 1959. The calcium chloride pits and the crystallizers remained however, and each year they temporarily filled with water during the winter rainy season.[1] The extent of ponding is limited, but standing water did form on the property and remain long enough for fish to live in the ponds. Plant life, which had been nonexistent due to the high salinity and compaction of the soil, formed in the crystallizers after Leslie plowed the property in 1983 to combat a dust problem.

The property was also substantially affected by construction of a sewer line and public roads on and around the property. This construction created ditches, road beds, and most importantly, culverts which hydrologically connected the property to the Newark Slough. Caltrans, the state highway authority, also breached a levy on the wildlife refuge adjacent to the property and destroyed a tidegate which had prevented the tidal backflow from reaching Leslie's property.

The effect of all this human activity was to foster natural, ecological developments: tidewater reached the edges of Leslie's property and caused the creation of some wetland features on the southern fringes. Migratory birds used the crystallizers and calcium chloride pits as habitat during the winter and spring when they were flooded. In addition, an endangered species, the salt marsh harvest mouse, used the property as habitat.

The controversy over this property arose in late 1985 when Leslie started to dig a feeder ditch and siltation pond

[1]The San Francisco Bay area has a Mediterranean climate, in which rain falls primarily in the winter and spring, followed by a long dry season.

on parcel 143 in order to drain the land. The Corps soon became aware of this activity and responded by issuing a cease and desist order pursuant to its authority under Section 404 of the Clean Water Act.[2] In that Act Congress directed the Corps, through the Secretary of the Army, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Corps claimed that Leslie was discharging a pollutant (fill) into waters of the United States in violation of section 301 of the Act.[3] The Corps also claimed that Leslie's activities were obstructing the navigable waters of the United States in violation of section 10 of the Rivers and Harbors Appropriations Act.[4] The Corps issued a second cease and desist order in early 1987 to stop Leslie from placing fill on parcel 10. The Corps issued that order in response to Leslie's attempts to block a culvert that connected its property to the Newark Slough.

[2]Section 404(a) of the Clean Water Act, 33 U.S.C. § 1344(a) (1982), provides in pertinent part:

> The Secretary [of the Army] may issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

[3]Section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a) (1982), provides in pertinent part:

> Except as in compliance with this section and section[ ] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

The Act defines fill as a pollutant at 33 U.S.C. § 1362(6).

[4]Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1982), provides in pertinent part:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; . . . and it shall not be lawful to excavate or fill . . . any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

In sum, the Corps claimed jurisdiction over the majority of the property. Leslie challenged that claim of jurisdiction and filed suit; the Corps countersued. The district court found in favor of Leslie on all grounds, holding that the property was not subject to the Corps' jurisdiction. The United States appealed that decision. Save San Francisco Bay Association and the National Audubon Society intervened on behalf of the United States.

The Corps now asserts jurisdiction over the property based on two separate theories which apply to two distinct portions of Leslie's land. First, the Corps argues that most of parcel 10 and the southern tip of parcel 143 are adjacent wetlands that are part of the Corps' Clean Water Act jurisdiction.[5] To resolve this dispute we must first determine whether Congress intended that Clean Water Act jurisdiction should extend to property which government actions helped make aquatic. Because we find that it did, we then look to the Corps' regulations interpreting the Act, to determine whether they allow Corps jurisdiction. The Corps' second theory relates to the former crystallizers and calcium chloride pits. The Corps claims that these features are "other waters," as defined by Corps' regulations, that are subject to its jurisdiction.

STANDARD OF REVIEW

The district court's findings of fact are subject to a clearly erroneous standard of review. Issues of law, as well as mixed

[5]The Corps also claims that the southern portions of the property are affected by the ebb and flow of the tide, and thus are subject to the Corps' jurisdiction under the Clean Water Act and the Rivers and Harbors Act. See 33 C.F.R. §§ 328.3(a)(1), 328.4(b)(1) and 329.12(a)(2). *See also United States v. DeFelice*, 641 F.2d 1169, 1175 n. 15 (5th Cir. Unit A April 1981) (citing cases). Because we find in favor of the Corps on its wetlands claim, we do not reach this alternate argument.

questions of fact and law that involve consideration of legal concepts rather than essentially factual inquiries, are reviewable de novo. *United States v. McConney*, 728 F.2d 1195, 1200-02 (9th Cir.), *cert. denied*, 469 U.S. 824, 83 L. Ed. 2d 46, 105 S. Ct. 101 (1984).

When considering the Corps' interpretation of the Clean Water Act we defer to the agency's analysis if it is "reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985); *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844-45, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). The agency's interpretation of its own regulations is entitled to greater deference, amounting to a plain error standard. *Montana Power Co. v. EPA*, 608 F.2d 334, 345 (9th Cir. 1979); *Chemical Waste Management, Inc. v. EPA*, 277 U.S. App. D.C. 220, 873 F.2d 1477 (D.C. Cir. 1989).

THE SOUTHERN PORTIONS OF THE PROPERTY

The Corps claims that the southern portions of the property are wetlands within its jurisdiction.[6] The district court denied the Corps jurisdiction for three reasons: (1) the wetland conditions were caused by the government, (2) the conditions were not "normal," as required by 33 C.F.R. § 328.3(b), and (3) the property was not adjacent to waters of the United States, as required by 33 C.F.R. § 328.3(a)(7).

[6]The Corps initially claimed that almost all of the property qualified as a wetland. The United States only appeals the district court's determination as to the southern portions of the property, which the district court found had the physical characteristics of wetlands.

A. Governmentally Caused Inundation

We agree with the district court that Congress intended to create a very broad grant of jurisdiction in the Clean Water Act, extending to any aquatic features within the reach of the commerce clause power. *See Leslie Salt Co. v. Froehlke*, 578 F.2d 742, 755 (9th Cir. 1978) (citing *California v. EPA*, 511 F.2d 963, 964 n. 1 (9th Cir. 1975), *rev'd on other grounds*, 426 U.S. 200, 48 L. Ed. 2d 578, 96 S. Ct. 2022 (1976)). However, the district court made an exception to this broad Congressional mandate and held that changes to the property *caused* by the government do not create jurisdiction. The court reasoned that a contrary holding would allow the Corps "to expand its own jurisdiction by creating some wetland conditions where none existed before." While this is a valid concern, the facts of this case do not present such a problem.

The district court relied upon *United States v. City of Fort Pierre*, 747 F.2d 464 (8th Cir. 1984). In *Fort Pierre*, the Corps asserted section 404 jurisdiction over a dry slough that had begun to exhibit wetland characteristics as a direct result of the Corps' dredging activity on a nearby river. The Eighth Circuit held that the Corps did not have jurisdiction due to the "peculiar facts and unique circumstances" of that case, in which "the Corps, as an unintended by-product of ordinary river maintenance, inadvertently create[d] a wetland-type ecological system on private property where no such system previously existed." *Id.* at 466, 481. The Eighth Circuit recently reaffirmed limiting Fort Pierre to these specific facts. *See United States v. Southern Inv. Co.*, 876 F.2d 606, 612 (8th Cir. 1989).

The factual situation in this case differs substantially from that in *Fort Pierre*. Here, the Corps was not directly and solely responsible for flooding Leslie's land: Caltrans constructed the culverts which allowed water to flow onto Leslie's property; Caltrans and the Fish and Wildlife Service

breached the levee on the wildlife refuge adjacent to Leslie's property which allowed water to flow up the culverts; Caltrans and the Fish and Wildlife Service failed to place effective floodgates on the culverts; Leslie itself maintained floodgates which unknown third parties propped open. Contrary to the district court's conclusion, the Corps did not itself create the wetland conditions and thereby attempt to expand its own jurisdiction.[7]

The fact that third parties, including the government, are responsible for flooding Leslie's land is irrelevant. The Corps' jurisdiction does not depend on how the property at issue became a water of the United States. Congress intended to regulate local aquatic ecosystems regardless of their origin. *See, e.g., Swanson v. United States,* 789 F.2d 1368 (9th Cir. 1986) (Corps construction of a dam creates waters under Corps jurisdiction); *United States v. Tull,* 769 F.2d 182, 184 (4th Cir. 1985) (federal construction of mosquito-control ditch creates waters under Rivers and Harbors Act jurisdiction), rev'd on other grounds, 481 U.S. 412, 414 n.1, 95 L. Ed. 2d 365, 107 S. Ct. 1831 (1987); *United States v. DeFelice,* 641 F.2d at 1175 (illegal and unauthorized acts of third parties can create Rivers and Harbors Act jurisdiction), *cert. denied,* 454 U.S. 940, 70 L. Ed. 2d 247, 102 S. Ct. 474 (1981); *Track 12 Inc. v. District Engineer, U.S. Army Corps of Engineers,* 618 F. Supp. 448, 449 (D. Minn. 1985) (state and locality construction of highway and sewage system creates Corps jurisdiction). If the Corps' regulations under Clean Water Act jurisdiction harm a landowner, her appropriate response is to seek damages through inverse condemnation proceedings, not to restrict the scope of Corps jurisdiction. *Riverside Bayview Homes,* 474 U.S. at 128.

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[7] All parties agree that the district court's statement that "the Corps flooded the wildlife refuge and thereby brought tidewater further inland," directly contradicts the record and its own statement of facts.

B. Normal Circumstances

The district court's second rationale for denying Corps jurisdiction over the southern portions of the property was a Corps regulation that defines wetlands as an area that "under normal circumstances" supports wetland vegetation. 33 C.F.R. § 328.3(b). Although the district court found the requisite wetland conditions, it held that "circumstances in those areas are not 'normal,' because the ability to support [wetland] vegetation was caused primarily by the government's flooding of the wildlife refuge across [the road]." The district court's interpretation of the "normalcy" requirement is tainted by its holding excluding governmentally created artificial waters from Corps jurisdiction.

The phrase "under normal circumstances" is meant to exclude those areas which are not aquatic, but experience an "abnormal presence of aquatic vegetation." 42 Fed. Reg. 37128 (1977). According to the district court's findings, the southern fringes of the parcel are aquatic areas. The fact that these wetlands are man-made does not make them "abnormal." Whether the wetlands are artificially or naturally created is irrelevant to this determination.

C. Adjacency

We disagree with the district court's third alternative holding, that this wetland is not adjacent to waters of the United States, as required by 33 C.F.R. § 328.3(a)(7). In reaching this conclusion, the district court again relied on its decision to exclude from consideration any consequences of the backflow through the culverts created by Caltrans and the Fish and Wildlife Service. In the absence of this erroneous holding, the southern portions of the property are adjacent to waters of the United States — the water in the culvert, which is directly connected to the Newark Slough.

THE CRYSTALLIZERS AND PITS

The Corps determined that the former crystallizers and calcium chloride pits qualified as "other waters" that were under Corps jurisdiction according to 33 C.F.R. § 328.3(a)(3). That section defines "waters of the United States" to include:

> All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce. . . .

The district court held that the crystallizers and pits were not described by this section for two reasons. First, because they are artificial structures and the regulation lists only natural formations. Second, the court concluded that the ponding was too temporary to qualify as other waters. The district court also addressed but did not decide the question of whether the property has a sufficient connection to interstate commerce.

A. Artificial vs. Natural Formations

The district court applied the doctrine of *ejusdem generis*[8] to construe the regulations to exclude artificially created waters. The court noted that all the waters listed as "other waters" in section 328.3(a)(3) were naturally created, and

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[8]The "ejusdem generis rule" is, that where general words follow an enumeration of persons or things, by words of a particular and specific meaning, such general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same general kind or class as those specifically mentioned. . . . [The rule does not] apply when the context manifests a contrary intention. *Black's Law Dictionary*, 464 (5th ed. 1979). See also 2A *Sutherland Statutory Construction* § 47.17 at 103 (4th ed. 1973).

concluded that the artificially created crystallizers and calcium chloride pits could not be covered by that section. The *ejusdem generis* rule of statutory construction is used to illuminate the intent of the drafters; when the rule conflicts with other, clearer indications of intent, its results should be ignored. *See Weyerhaeuser S.S. Co. v. United States,* 372 U.S. 597, 601, 10 L. Ed. 2d 1, 83 S. Ct. 926 (1963); *Black's Law Dictionary,* 464 (5th ed. 1979). Reliance on the rule is inappropriate in this case.

First, the district court's interpretation conflicts with other parts of the Corps' regulations which assert that the Corps generally has jurisdiction over man-made waters under both the Clean Water Act and the Rivers and Harbors Act. See 33 C.F.R. §§ 328.5, 329.8. The Corps also defines at least one of the features listed in section 328.3(a)(3) to include artificial waters. *See* 33 C.F.R. § 323.2(b) ("lake" includes "a standing body of open water created by artificially blocking or restricting the flow of a river, stream or tidal area"). In addition, the Corps' comments to the final regulations support the power of the Corps to assert jurisdiction over artificially created waters:

> [We] generally do not consider the following waters to be "waters of the United States." However, the Corps reserves the right on a case-by-case basis to determine that a particular waterbody within these categories of waters is a water of the United States.
>
> * * *
>
> (c) Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which *are used* exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing.
>
> * * *
>
> (e) Water filled depressions created in dry land incidental to construction activity and pits excavated in dry land for the purpose of obtaining fill, sand or gravel

> *unless and until the construction or excavation operation is abandoned* and the resulting body of water meets the definitions of waters of the United States (see 33 C.F.R. 328.3(a)).

51 Fed. Reg. 41206, 41217 (1986) (emphasis added). These comments show that the Corps intends to exempt from its jurisdiction only those artificially created waters which are currently being used for commercial purposes, and that even those waters are subject to such jurisdiction on a "case-by-case" basis of review. The crystallizers and calcium chloride pits have not been used for commercial purposes for decades and so are not subject to even this limited exemption. Finally, courts have uniformly included artificially created waters in the Corps' jurisdiction under the Clean Water Act and the Rivers and Harbors Act. *See, e.g., Tull,* 769 F.2d 182 (mosquito-control ditch); *Stoeco Dev. Ltd. v. Dept. of the Army Corps of Eng'rs,* 701 F. Supp. 1075, 1078 (D. N.J. 1988) (artificially created wetland), *appeal dismissed,* 879 F.2d 860 (3rd Cir. 1989); *United States v. Akers,* 651 F. Supp. 320 (E.D. Cal. 1987) (same); *Track 12,* 618 F. Supp. 448 (same); *United States v. Ciampitti,* 583 F. Supp. 483 (D. N.J. 1984) (same), *affirmed,* 772 F.2d 893 (3rd Cir. 1985), *cert. denied,* 475 U.S. 1014, 89 L. Ed. 2d 307, 106 S. Ct. 1192 (1986). We reject the district court's interpretation of the regulations as creating a distinction between artificial and natural waters.

B. Temporary Water Formations

The district court also held that the crystallizers and calcium chloride pits were not other waters because they "are in fact dry most of the year." Due to the climate in the Bay Area, ponding only occurs during the winter rainy season. The seasonal nature of the ponding is no obstacle to Corps jurisdiction however, because the regulations specifically enumerate two seasonal water features as other waters: intermittent streams and playa lakes. *See Quivira Mining*

Co. v. EPA, 765 F.2d 126, 130 (10th Cir. 1985), *cert. denied*, 474 U.S. 1055, 88 L. Ed. 2d 769, 106 S. Ct. 791 (1986); *United States v. Phelps Dodge Corp.*, 391 F. Supp. 1181, 1187 (D. Ariz. 1975).

The Corps' determination that the crystallizers and calcium chloride pits are similarly seasonal bodies of water within the meaning of the regulations is proper. We reverse the district court's contrary conclusion.

C. Interstate Commerce

The crystallizers and pits must still have sufficient connections to interstate commerce to come under the Corps' jurisdiction as "other waters." 33 C.F.R. § 328.3(a)(3). The Corps has adopted the following EPA criteria to determine when waters have sufficient ties to interstate commerce:

> [Waters]
>
> a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
>
> b. Which are or would be used as habitat by other migratory birds which cross state lines; or
>
> c. Which are or would be used as habitat for endangered species. . . .

51 Fed. Reg. 41206, 41217. The district court failed to determine whether the crystallizers and pits meet these standards. The record showed however, that migratory birds (including many protected by Migratory Bird Treaties) and one endangered species may have used the property as habitat. The commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species. *See Utah v. Marsh*, 740 F.2d 799, 804 (10th Cir. 1984); *Palila v. Hawaii Dep't of Land and Natural Resources*, 471 F. Supp. 985, 991-95 (D.Haw. 1979), *aff'd*, 639 F.2d 495 (9th Cir. 1981). *See generally*

Hughes v. Oklahoma, 441 U.S. 322, 329-36, 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1979). We remand this issue to the district court to determine if the property has the requisite connections to interstate commerce.

CONCLUSION

The southern portions of Leslie's property meet both the statutory and regulatory requirements for the Corps to exert Clean Water Act jurisdiction over them. The fact that the government in part caused the inundation of the property is not of consequence. Similarly, the government's actions do not affect the normalcy or adjacency requirements of the regulations. As to the crystallizers and calcium chloride pits, their artificiality and temporary wetness pose no obstacle to Corps jurisdiction. We remand to the district court for a factual determination of the sufficiency of the property's connections to interstate commerce. Because the record reflects that the Corps' jurisdiction does not extend to the total property, we also remand to determine over which portion of the property the Corps has valid jurisdiction in light of this opinion's legal conclusions. Costs will abide the final determination.

REVERSED and REMANDED.

RYMER, Circuit Judge, concurring in part, dissenting in part:

I join in the majority's holding that the southern portions of Leslie's property meet the Clean Water Act requirements for Corps' jurisdiction. I disagree, however, with the majority's conclusion that the district court erred in its treatment of the crystallizers and calcium chloride pits.

The crystallizers and pits are seasonal bodies of water that derive their major source of water from rain. There is standing water in the crystallizers and pits during the winter rainy season, when the rain collects, until early to mid-spring, when all the water has evaporated. The rest of the

year the crystallizers and pits are dry. Although the majority is correct that "the seasonal nature of the ponding is no obstacle to Corps' jurisdiction," the cycle of ponding in the crystallizers and pits creates no hydrological connection with any other body of water. This fact distinguishes *Quivira Mining Co. v. EPA*, 765 F.2d 126 (10th Cir. 1985) and *United States v. Phelps Dodge*, 391 F. Supp. 1181 (D. Ariz. 1975). Even though three fish may have found their way into one of the ponds, there is nothing in the record to show that water flows directly or indirectly from the crystallizers or pits into another body of water.

That being the case, the district court correctly determined that the crystallizers and pits are not "other waters" within the meaning of section 328.3(a)(3). It is therefore unnecessary to reach the issue on which the Supreme Court has declined to rule, see *United States v. Riverside Bayview Homes*, 474 U.S. 121, 131 n. 8, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985): whether the Clean Water Act extends Corps' jurisdiction to waters that are not "adjacent to bodies of open water."[1]

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[1]The majority holds that "the commerce clause power, and thus the Clean Water Act, is broad enough to extend the Corps' jurisdiction to local waters which may provide habitat to migratory birds and endangered species." Congress does have power under the Commerce Clause to regulate wildlife and endangered species. *Palila v. Hawaii Dep't of Land and Natural Resources*, 471 F. Supp. 985 (D.Haw. 1979), aff'd 639 F.2d 495 (9th Cir. 1981) and *Hughes v. Oklahoma*, 441 U.S. 322, 60 L. Ed. 2d 250, 99 S. Ct. 1727 (1976) stand for that proposition. However the issue in this case is not whether Congress has the power under the Commerce Clause to regulate wildlife and endangered species, but whether Congress meant to extend Corps' jurisdiction under the Clean Water Act to the full extent of its commerce clause power. Specifically, it is: is it reasonable for Corps' jurisdiction to rest on the fact that migratory birds and endangered species may use the waters as a habitat? In *Utah v. Marsh*, 740 F.2d 799 (10th Cir. 1984), the other opinion on which the majority relies, the lake was used for several purposes that established a connection to interstate commerce. It is unclear whether the *Marsh* court would have found a substantial enough effect on interstate commerce, and thus Corps' jurisdiction under the Clean Water Act, had the only connection to interstate commerce been that "the lake was on flyway of several species of migratory waterfowl . . . ." *Id.* at 803.

In addition, in *Riverside Bayview Homes* the Supreme Court held that since the Corps' asserted jurisdiction over adjacent wetlands was brought to the attention of Congress "through legislation specifically designed to supplant it" (Congress' consideration of the Clean Water Act of 1977, a major piece of legislation aimed at achieving "interim improvements within the existing framework" of the Clean Water Act, H.R. Rep. No. 95-139 pp. 1-2 (1977)), and Congress rejected efforts designed to curb that jurisdiction, that was "at least some evidence of the reasonableness of the [Corps'] construction." 474 U.S. at 137. Such evidence of reasonableness does not exist in this case. The Corps issued new regulations governing its regulatory programs on November 13, 1986 in order to clarify the scope of the Section 404 permit program. The new regulations placed the definition of "waters of the United States" into a new Part 328 of Title 33 of the Code of Federal Regulations. As a further clarification, and as an addition to the old regulations, the new regulations stated that "waters of the United States" also include the following: areas which are "or would be" used as a habitat for migratory birds or endangered species. 33 C.F.R. § 328.3(a)(3). This 1986 addition to, or clarification of, the Corps' regulations was not considered during congressional debates on the Clean Water Act of 1977. Therefore, the evidence of reasonableness that the Supreme Court found regarding the Corps' regulations in *Riverside Bayview Homes* does not apply to the 1986 clarification of those regulations, in particular, the list that includes migratory and endangered species habitats.

APPENDIX E

LESLIE SALT CO., a Delaware corporation,
Plaintiff,

v.

UNITED STATES OF AMERICA; JOHN O. MARSH, et al.,
Defendants.

UNITED STATES OF AMERICA,
Plaintiff,

v.

LESLIE SALT CO., a Delaware corporation,
CARGILL INC., a Delaware corporation,
Defendants.

Nos. C-85-8615-CAL, C-86-4187-CAL

United States District Court,
N.D. California

September 29, 1988
As Amended January 11, 1989

OPINION

LEGGE, District Judge:

These cases were tried to the court, sitting without a jury. The cases were then argued and submitted for decision following the completion of briefing. The court has heard and reviewed the testimony of the witnesses, and has reviewed the designated deposition transcripts, the exhibits, the designated discovery responses, the record of the case, and the applicable authorities. This opinion constitutes the

court's findings of fact and conclusions of law, as provided in Rule 52(a) of the Federal Rules of Civil Procedure.

I. Parties

Leslie Salt Co., a Delaware corporation, is the plaintiff in C-85-8615 and a defendant in C-86-4187. Cargill Inc., a Delaware corporation, is the owner of Leslie Salt Co. and is also a defendant in C-86-4187. Those parties will jointly be called "Leslie" in this opinion. The United States of America is the plaintiff in C-86-4187 and the defendant in C-85-8615. The Secretary of the Army, the United States Army Corps of Engineers, and certain officers of the Corps of Engineers are also defendants in C-85-8615. The United States, the Secretary, the Corps and its officers are collectively called the "Corps." The Save San Francisco Bay Association, Inc., and the National Audubon Society were granted leave to intervene as defendants in C-85-8615.

II. Jurisdiction of the Court

There is no dispute between the parties as to the jurisdiction and venue of this court. Jurisdiction is predicated on 28 U.S.C. §§ 1331, 1345, 1346, and 2201-2202, 33 U.S.C. §§ 406 and 1319(b). The property in dispute is located in this district, and venue is proper under 28 U.S.C. §§ 1391(b), 1391(e) and 1402, and 33 U.S.C. § 406 and 1319(b).

These actions arose when the Corps issued a cease and desist order to Leslie pertaining to Leslie's activity on certain property that Leslie owns in the City of Newark, California. The Corps asserted jurisdiction over the property under § 1344 of the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, and subsequently also asserted jurisdiction under § 403 of the Rivers and Harbors Act, 33 U.S.C. § 401 *et seq.* Leslie filed action C-85-8615 to contest the Corps' jurisdic-

tion over the property. The Corps then brought action C-86-4187 to establish its jurisdiction over the property under those two Acts, and claimed that Leslie had violated those Acts in connection with its activities on or connected with the property. The principal, but not the only, question to be resolved is whether the property is a "wetland" within the meaning of the applicable statutes and regulations, and hence is under the jurisdiction of the Corps.

III. Burden of Proof

Before trial the Corps moved for a bifurcation and stay of the action. The motion in essence asked this court to refer the central issue in this case — whether the property is under the jurisdiction of the Corps — to the Corps for its administrative decision. That decision would have then been reviewable by this court under the Administrative Procedure Act, 5 U.S.C. § 706. The record for that review would have been confined to the Corps' decision and its administrative record, and the review would have been under the limited standard of whether the Corps' decision was arbitrary, capricious, an abuse of discretion, or contrary to law. This court denied that motion and determined that the issues should be tried as plenary actions in this court. *Leslie Salt Co. v. United States*, 660 F. Supp. 183 (N.D. Cal. 1987).

At trial, the Corps acknowledged that the burden of proof in this plenary civil trial is the preponderance of the evidence. However, the parties disagree about what must be proved. Leslie contends that it has the burden of showing that the Corps lacks jurisdiction over its property. The Corps contends that Leslie must prove that the Corps' assertion of jurisdiction is arbitrary and capricious.

The basis for the Corps' argument is the well-settled principle that an agency's interpretation of a statute which it administers is generally entitled to substantial deference, as is the agency's interpretation of its own regulations. *Ford*

Motor Credit Co. v. Milhollin, 444 U.S. 555, 566, 63 L. Ed. 2d 22, 100 S. Ct. 790 (1980). Under this principle, the court must accept the agency's interpretation so long as it is "reasonable and not in conflict with the expressed intent of Congress." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131, 88 L. Ed. 2d 419, 106 S. Ct. 455 (1985).

The court cannot determine whether the Corps has jurisdiction over Leslie's property with no reference at all to the Corps' interpretation of the applicable statutes and regulations. However, the Corps' interpretation is not entitled to prevail simply because it is not capricious or arbitrary. The issue is whether it "is *reasonable*, in light of the language, policies, and legislative history of the Act[s] for the Corps to exercise jurisdiction." *Id.* at 131 (emphasis added).

The standard of reasonableness requires evaluating the evidence in light of the language of the Clean Water Act, the Rivers and Harbors Act, and the applicable regulations under those Acts. That requires consideration of a number of factors, including the degree of the Corps' scientific or technical expertise necessarily drawn upon in reaching its interpretation, the consistency of the interpretation within the Corps, the length of adherence to the interpretation, and the explicitness of the Congressional grant of authority to the Corps. *See Avoyelles Sportsmen's League v. Marsh*, 715 F.2d 897, 910-911 (5th Cir. 1983).[1]

This is the standard which this court has followed in this case. The court emphasizes that this reasonableness standard does not affect the parties' evidentiary burdens in proving disputed factual issues. Deference does not require the court to accept the Corps' version of the evidence. And

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[1] If the court determines that the Corps has jurisdiction, certain decisions would then be made by the Corps under its administrative processes.

the facts stated in this opinion are found by this court to be facts by a preponderance of the evidence.

IV. The Role of the Court

Underlying the legal and factual issues to be decided in this case is the financial question of what use will be made of the property. It is obviously a valuable piece of commercial property, and Leslie seeks to develop it. By asserting jurisdiction, the Corps seeks to preclude or restrict that development, and in essence to maintain the property in its present undeveloped state.

This case therefore involves a balance between the rights of private property on the one hand, and the interests of the government and the public on the other. The scale for measuring that balance is defined by Congress in the Clean Water Act and the Rivers and Harbors Act.

The role of this court is not to sit as a super-ecologist. That is, it is not the function of this court to decide what *should* be done with the property in the best interests of ecological balance. If that were the court's function, this court would probably say that the San Francisco Bay Area has too much development and that more land should be left undeveloped. But that is not the court's function. This court's role is to define what Congress did under the Acts, to define what powers the Corps has been given by Congress and by the regulations, and to apply those definitions to the evidence which the court has heard about the property. In order to restrict or prevent Leslie's right to develop its property, the court must find from the evidence that the property is within the jurisdiction of the Corps under those Acts and regulations. That is the extent of the judicial power in this dispute.

V. The Property

The property is owned by Leslie. It totals one hundred fifty-three acres, divided by a road into two parcels of approximately one hundred forty-three acres and ten acres. Except where there is a reason to distinguish between them, both parcels will be collectively called the "property."

The property is located in the City of Newark, Alameda County, California. It is surrounded on all sides by roads and highways. The one hundred forty-three acre parcel ("parcel 143") is bounded on the north by State Highway 84, on the west by Thornton Avenue, on the south by relocated Jarvis Avenue, and on the east by Jarvis Avenue, with residential subdivisions of the City of Newark lying east across Jarvis Avenue. The ten acre parcel ("parcel 10") is located across relocated Jarvis Avenue to the south of parcel 143 and is bounded by Thornton and Jarvis Avenues.

Across Thornton Avenue to the west of the property is the San Francisco National Wildlife Refuge, situated on land which was previously taken from Leslie by condemnation action of United States. The nearest navigable water is Newark Slough, which is approximately one quarter mile from the southernmost tip of the property, and that point is approximately two miles from San Francisco Bay.

Parcel 143 consists of areas of differing characteristics which are important for purposes of this litigation. Approximately the eastern one-third of the parcel is pasture land. Located on the pasture land are two pits, which were formerly used by Leslie for the deposit of calcium chloride. The remaining two thirds of parcel 143 constitutes land surface which Leslie previously used as crystallizers for the manufacture of salt. The parcel has also been impacted by the construction of highways, a sewer line and ditches, and by plowing, as discussed below. There are no tributary streams or rivers either on or adjacent to the property. The

property has never been inundated by tides. The property is drained of water, and is subject to some backflow, through three culverts which run under Thornton Avenue. One is located at the southernmost tip of parcel 10, and runs under Thornton Avenue to Newark Slough. The second is located near the intersection of Jarvis and Thornton, and runs under Thornton Avenue onto the wildlife refuge. The third is located approximately halfway up Thornton Avenue, and also runs under Thornton Avenue and onto the wildlife refuge.[2]

For purposes of this case, the condition of the property must also include consideration of weather. The San Francisco Bay Area has what is called a Mediterranean climate. That is, rain is not consistent throughout the year, but occurs primarily in the winter months with little or no rainfall during the balance of the year. Since the climate is wet in one season and dry the remainder of the year, the amount of water on the property will vary over the year. As a result, observations and scientific tests on the "wetness" of the land will depend in part on when the observations and tests are made.

VI. History of the Property

The issue in this case is whether the property is subject to Corps' jurisdiction. That decision must be made by examining the characteristics of the property as it now is (or more accurately, as it was in 1985 when the Corps asserted jurisdiction) under the definitions of the Acts and the regulations. The inquiry is not the condition of the property at some prior time in its history. Nevertheless, some references to the history of the property are appropriate as being probative of its conditions today. Indeed, even the Corps argues that the formation of the soils in the geological history of the property is relevant to a determination of whether those soils are "hydric" today. The court will therefore briefly discuss the history of the property insofar as its general background is probative of the present condition of the property.

[2]This property is not of the same type or location as that discussed in *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978). The property in that case was, in its natural condition, marshland subject to the ebb and flow of the tide. The present property is not marshland. *Id.* at 745.

The property was originally acquired by Leslie's predecessors in interest in the late 1800s. A certain portion of the property, primarily the eastern one-third of parcel 143, has been used as pasture and grazing land for livestock since that time. In approximately 1919, Leslie's immediate predecessor in interest began to construct facilities on the property for the manufacture of salt. A railroad spur, a salt refining plant and related buildings were erected. Pits were excavated on the eastern one-third of the property for depositing calcium chloride.

The western two-thirds of the property was made into so-called salt crystallizers, which held salt brine during the final stage of the solar salt production process. The crystallizers were constructed on dry land, by excavating large shallow basins, and leveling and compacting the soil on the bottom to create a level and watertight surface. The excavated soil was used to build earthen levees around the crystallizers to form watertight earthen containers. During the years of their use by Leslie, saturated salt brine (which had been produced by Leslie's evaporation ponds located closer to San Francisco Bay) was pumped through the Coyote Hills and into the crystallizers. The salt then precipitated and settled onto the bottom of the crystallizers. The remaining liquid was drawn off, and the salt was harvested by large mechanical harvesters that ran across the floor of the crystallizers. The salt was then moved by railcars to a refining plant

located on the property. After each harvest of the salt, the crystallizers were drained, releveled, and recompacted.

By 1959 the use of the property to manufacture salt became uneconomical. Since 1959 (with the exception of some limited production in 1962 and 1968), no use was made of the crystallizers, and that portion of the property has remained dry, except when rainwater accumulates during the winter. Ponds temporarily form after rains, because the floor of the crystallizers has remained relatively watertight as a result of their construction and frequent compaction. Before being plowed in 1983, the crystallizers were generally devoid of any vegetation, due to the compaction and the high salinity of the soil resulting from their prior use in the manufacture of salt.

A dust problem resulted from the dry and barren condition of the crystallizers. Dust blew from their surface onto the neighboring housing tracts across Jarvis road. As a result, Leslie was cited for air pollution violations. In an attempt to control the dust problem, Leslie plowed the property in 1983 and 1985. The plowing had the obvious result of loosening the soil in the crystallizers and creating furrows. That loosening of the soil and creation of furrows resulted in conditions somewhat more hospitable to the growth of plants.

Two other acts of man affect the present character of the property. In the early 1980s, the Eastbay Dischargers Authority constructed a large sewer line across the property. The construction had the effect of disturbing the natural conditions and left fill and inundations on the property. Between 1980 and 1983, Caltrans constructed Highway 84 across the northern part of the property; relocated Thornton Avenue across the western portion of the property; and relocated Jarvis Avenue, dividing the property into the two parcels. These construction activities by Caltrans resulted in the creation of highways, roadbeds, ditches, and drainage

facilities, including culverts under Thornton Avenue. The Caltrans construction also breached a levy on the wildlife refuge and destroyed an inflow control that had prevented Newark Slough from flooding the refuge area. The Caltrans construction was also apparently responsible for the destruction, or the keeping open, of what had been a tidegate on one of the culverts under Thornton Avenue. Leslie has asked Caltrans to put a floodgate on one of the culverts, but Caltrans has declined because of the controversy over the issues in this case.

That is the present condition of the property. For purposes of this discussion and the Corps' claim of jurisdiction, the property can be discussed by reference to the following segments: (a) the western two-thirds of parcel 143, which is the former crystallizer area; (b) the eastern one-third of parcel 143, which has primarily been pasture land; (c) the calcium chloride pits dug on that eastern one-third; (d) parcel 10; and (e) the physical characteristics created by the Caltrans and the sewer construction.

What significance is to be given to the fact that certain of the present features were man-made? The Corps takes the position that this fact should be ignored. Leslie argues that the court should not consider the impact of changes that were made to the property by others without Leslie's consent.

The significant man-made changes to the property include the construction by Caltrans discussed above. In addition, the United States extended some of the drainage ditches across the wildlife refuge to Newark Slough, for the purpose of carrying tidewater onto the refuge in order to create a wetland environment there. Despite requests from Leslie, neither the United States nor Caltrans has installed effective tide control mechanisms on the culverts or ditches, with the result that some water occasionally reaches the edges of Leslie's property in the culverts and ditches. Leslie

has attempted to install floodgates on the ditches, but these mechanisms were either opened or removed by others.

The court agrees generally with the Corps that the impact of human activity is not, in the usual case, relevant to the Corps' jurisdiction under the Clean Water Act. If a water body is a "water of the United States," it does not matter how it came to be so. *See, e.g., United States v. Akers*, 651 F. Supp. 320, 322 (E.D. Cal. 1987); *Track 12, Inc. v. District Engineer*, 618 F. Supp. 448, 450 (D. Minn. 1985).

The situation in this case, however, is not typical. The reported decisions on the significance of man-made alterations have involved properties that were indisputably "wetlands," or were otherwise "waters of the United States." In addition, those cases did not involve acts of man that were taken without the consent of, and over the protest of, the owner of the property.

In this case, the Corps flooded the wildlife refuge and thereby brought tidewater further inland, reaching the edge of Leslie's property. Moreover, the Corps and Caltrans have refused to install tide control mechanisms that would prevent water from reaching the property, and the Corps has prevented Leslie from maintaining such devices. The Corps has in essence tried to expand its own jurisdiction by creating some wetland conditions where none existed before.

Such actions by a government agency undermine the balance struck by Congress between regulation and private ownership. This court therefore concludes that the impact of backflow of water over the wildlife refuge and through the culverts and Caltrans drainage ditches should not be considered in determining the Corps' jurisdiction.

This conclusion is consistent with *United States v. City of Fort Pierre*, 747 F.2d 464 (8th Cir. 1984). In that case, a dry slough bed began to exhibit wetland characteristics as a result of the Corps' dredging activity on a nearby river. The

court held that the effects of the acts of the Corps should be disregarded in determining Clean Water Act jurisdiction, because "to decide otherwise would allow the Corps to enlarge its jurisdiction beyond the scope originally intended by Congress." *Id.* at 467. This court believes that this principle applies in this case.

The government's reliance on *Swanson v. United States*, 789 F.2d 1368 (9th Cir. 1986) in this case is misplaced. In *Swanson*, the court held that when the Corps constructed a new dam, its jurisdiction was correspondingly extended to the new high water mark, however, in that case, Congress explicitly approved the dam construction. In this case, Congress did not approve the creation of wetland conditions on Leslie's property. The government argues that Congressional approval of the construction of the wildlife refuge authorizes an expansion of Corps jurisdiction over Leslie's property. However, Congressional approval of a project does not amount to a sanction for all consequences of the project, only those that are part of it. Congress approved a wildlife refuge of a certain dimension; it did not approve a wildlife refuge that was self-expanding. *Swanson* does not stand for the proposition that an agency can expand its own jurisdiction; it merely reinforces the truism that Congress may give, and Congress may take away, the regulatory jurisdiction of agencies.

VII. The Corps' Assertion of Jurisdiction

The events which led the Corps to assert jurisdiction over the property occurred in October 1985. Leslie began digging a feeder ditch and siltation pond on a portion of the former crystallizers. When the Corps became aware of this, a representative of the Corps visited the property and conferred with Leslie. The Corps then issued a telegraphic cease and desist order, and later a letter asserting jurisdiction.

A second event occurred in 1986-87 with respect to parcel 10. Leslie plugged one end of the culvert leading from that parcel to Newark Slough, in order to prevent water from backing up through the culvert and onto the parcel. The Corps objected to that activity and issued a cease and desist order.

Although Leslie contests the Corps' jurisdiction to issue those cease and desist orders, Leslie has not taken any steps in violation of them while this litigation has been pending.

The Corps asserts jurisdiction over the vast majority of the property, under numerous subsections of the Acts and regulations; *see* exhibit 639. The actual extent of its claim of jurisdiction is marked on a map which is exhibit 640. Leslie denies that any of its property is subject to Corps jurisdiction. It admits that certain small portions in the southernmost tip of parcel 10 and in the southwest corner of parcel 143 may exhibit wetland conditions at certain times of the year, and that water occasionally backs up through the culverts and into the Caltrans ditches. However, as stated above, Leslie contends that those conditions should not be considered for purposes of this case, because they resulted from activities of the United States and Caltrans to which Leslie did not consent.

VIII. Rivers and Harbors Act

Has Leslie violated § 403 of the Rivers and Harbors Act, 33 U.S.C. § 401, *et seq*. That issue first of all depends upon whether Leslie's property is subject to the jurisdiction of that Act.

Section 403 in essence prohibits the "creation of any obstruction . . . to the navigable capacity of any of the waters of the United States," and the alteration of the condition or capacity of any "navigable water of the United States." A general definition of the term "navigable waters of the

United States" is set forth in 33 C.F.R. § 329.4. And the extent of Corps' jurisdiction under the Act and the regulation has been interpreted in *Leslie Salt Co. v. Froehlke*, 578 F.2d 742 (9th Cir. 1978). As interpreted by the Ninth Circuit, the Corps' jurisdiction under that Act extends only to the portions of property that are "covered by the ebb and flow of the tide to the mean high water mark . . . in its unobstructed, natural state." *Id.* at 753.

The evidence established, and the Corps concedes, that none of Leslie's property is below the mean high water line, except certain elevations in the culverts under Thornton Avenue and in certain low-level portions of the drainage ditches constructed by Caltrans. However, the court has concluded for the reasons discussed above that the impact of these structures should not be considered in determining the extent of the Corps' jurisdiction over Leslie's property.[3] The court also finds that even if the culverts and ditches were considered, the evidence is not sufficient to establish that Leslie's property is subject to the jurisdiction of the Act as defined in *Leslie v. Froehlke*, above. Therefore, the court finds and concludes that the acts of Leslie did not violate the Rivers and Harbors Act.

IX. Clean Water Act

Congress passed what is now called the Clean Water Act in 1972, and has subsequently made several amendments. 33 U.S.C. § 1251, *et seq*. Congress did so acting under its Commerce Clause powers. It stated that its legislative objective was "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Congress' concerns in the Act were

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[3] 33 C.F.R. § 329.8(a) should not apply when the artificial condition was created against the owner's consent.

obviously with pollution of the nation's *waters*, and not with all forms of pollution throughout the United States.

Under the Act, certain activities are prohibited or limited. Among those is "the discharge of any pollutant." 33 U.S.C. § 1311. And Congress defined "pollutant" to include the dumping of fill. 33 U.S.C. § 1362(6).

The primary section with which we are concerned in this case is section 404 of the Clean Water Act, 33 U.S.C. § 1344. In subsection (a), Congress gave to the Corps the power to issue permits, and necessarily to deny permits, for the "discharge of dredged or fill material into the navigable waters." Congress defined the term "navigable waters" to mean the "waters of the United States." 33 U.S.C. § 1362(7). Congress did not define the term "waters of the United States."

Congress therefore gave the Corps jurisdiction to regulate the discharge of fill into the "waters of the United States." This circuit has said that the jurisdictional terms of the Act are to be given the broadest possible interpretation under the Commerce Clause of the constitution. *Leslie Salt Co. v. Froehlke*, 578 F.2d at 755. However, the Ninth Circuit has not defined the maximum limits of the Corps' jurisdiction under the Act. *Id.* at 756. And it is obvious from the statute and the definitions of Congress that the Corps' jurisdiction does not extend to dry land; it extends only to that which is properly "waters of the United States."

As stated, neither Congress nor the courts have defined the term "waters of the United States." The Corps has defined that term in its regulations. 33 C.F.R. § 328. The regulation states that its purpose is to define "the term 'waters of the United States' as it applies to the jurisdic-

tional limits of the authority of the Corps of Engineers under the Clean Water Act." 33 C.F.R. § 328.1.[4]

The primary subsection with which we are concerned here is § 328.3, which defines the terms used to describe property subject to the jurisdiction of the Corps. It is necessary to study some of this language in detail, and the applicable portions of the regulations are set out below.[5]

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[4]Other regulations of the Corps, including the regulations dealing with the issuance of permits if the Corps has jurisdiction, are contained in 33 C.F.R. §§ 320-330.

[5]§ 328.3 Definitions.

(a) The term "waters of the United States" means

(1) All waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

. . . .

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

. . . .

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section. . . .

(b) The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(c) The term "adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the United States by man-

The decisions to be made with respect to the regulations in this case are primarily ones of fact. That is, giving the Act and the regulations the broad interpretation defined by the U.S. Supreme Court and the Ninth circuit, does the evidence establish that the property is or is not within the definition of "waters of the United States?"

Before discussing the evidence and the language, the court notes that there are two conditions that clearly do not invoke the Corps' jurisdiction. First, land does not become a water of the United States just because water collects, ponds, and stands on land for a few days after a rain. Any land subjected to enough temporary rainfall will collect water which stands until it runs off or percolates into the ground. Such temporary collection of rain does not convert the land to a water. Second, land does not become a water of the United States simply because water drains off of the land and ultimately — through ditches, culverts, rivers, sewers, or the like — flows into waters of the United States. If such drainage made land "waters of the United States," then all property located on elevations, no matter how high, above a water of the United States would become "waters of the United States." But drainage off of land is not enough to make it a water of the United States. Not until flowing water becomes a "tributary" is it deemed to be a water of the United States, 33 C.F.R. § 328.3(a)(5), and the Corps does not contend here that the water that drains from Leslie's land is a tributary.

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made dikes or barriers, natural river berms, beach dunes and the like are "adjacent wetlands."

. . . .

(f) The term "tidal waters" means those waters that rise and fall in a predictable and measurable rhythm or cycle due to the gravitational pulls of the moon and sun. Tidal waters end where the rise and fall of the water surface can no longer be practically measured in a predictable rhythm due to masking by hydrologic, wind, or other effects.

The court turns now to an examination of the evidence and the portions of 33 C.F.R. § 328.3 under which the Corps claims that Leslie's property is a water of the United States.

A. The Ebb and Flow of the Tide

The first is § 328.3(a)(1). That includes "all waters which are subject to the ebb and flow of the tide." 33 C.F.R. § 328.4(b) provides that the tidal waters of the United States extend to the high tide line. The same term is used in section 328.3(d).

It is clear from the evidence that virtually all of Leslie's land lies above the high tide line. The property has never been inundated by tides. The only portions that are subject to any ebb and flow of the tide are low elevations in the ditches constructed by Caltrans, and certain small portions at the southernmost tip of the parcel 10 and the southwestern tip of parcel 143. That water gets there by backing up through one of the culverts running from the wildlife refuge under Thornton Avenue.

The Corps concedes that its jurisdiction does not cover drainage ditches that are dug on dry land. Regulation section 328.3(f) defines tidal waters as those that "rise and fall in a predictable and measurable rhythm." The tidal waters end "where the rise and fall of the water surface can no longer be practically measured." *Id.* The court finds and concludes that the water that does reach Leslie's land is not tidal water. The water comes from the bay, approximately two miles up Newark Slough, over the lands flooded by the United States for the wildlife refuge, and through culverts. The testimony of the government's witness that there might actually be tidal flow onto Leslie's property was not supported by sufficient objective data. And the court finds that any tidal impact cannot be practically measured.

As stated above, the court also believes that the principle stated in *City of Fort Pierre*, 747 F.2d at 467, is applicable

here. That is, it is primarily the flooded condition of the wildlife refuge across Thornton Avenue from Leslie's property that results in the flow of water through the culverts under the road. The evidence is clear that the property was not impacted by any inundation until the construction of the culverts. And since the United States created that condition by the flooding and maintenance of the wildlife refuge, it cannot assert jurisdiction as a result of its maintenance of that causal condition.

The court finds and concludes by a preponderance of the evidence that the property is above the high tide line and is not "subject to the ebb and flow of the tide."

B. Isolated Waters or Wetlands

The second subsection under which the Corps asserts that a portion of Leslie's property is a water of the United States is § 328.3(a)(3):

> (3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:
>
> (i) Which are or could be used by interstate or foreign travelers for recreational or other purposes; or
>
> (ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or
>
> (iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

This subsection has come to be called the "isolated" wetlands or waters provision. The general thrust of this subsection is that certain waters or wetlands may be waters of the United States even though they are physically unconnected with other waters of the United States. The jurisdictional nexus for including such isolated waters within federal jurisdiction is stated in the three subsections of (a)(3); that is, some connection with interstate travel or commerce.

To establish that interstate connection here, the Corps relies upon comments made about § 328.3(a)(3) in the Federal Register where the Corps issued the final regulations. 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). The comments state that the Corps adopts the definitions of the Environmental Protection Agency,[6] which includes consideration of the use of the property as habitat by migratory birds and endangered species. There was evidence at trial that the property is occasionally used by migratory birds, and one endangered species of mouse was found at one location on the property. The Corps' witnesses would extend that jurisdiction not only to *actual* use by migratory birds, but also to *potential* use. Leslie contends that Congress did not intend migratory birds or endangered species to be "interstate commerce" under the Clean Water Act, and that even if it did, such an extension of jurisdiction would not be constitutionally permissible.[7] However, this court need not reach those questions.

Before the interstate commerce connections are considered under the three subsections of (a)(3), the property must itself be "other waters" as described in section (a)(3). The Corps contends that the portions of the Leslie property which are such "other waters" are the calcium chloride pits and the former crystallizers during such periods as rainwater collects in them. The listing of "other waters" in section (a)(3) includes "lakes, rivers, streams . . . mud flats,

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[6] And the Environmental Protection Agency's general counsel opinion of November 19, 1985.

[7] The U.S. Supreme Court, in *Riverside Bayview Homes*, 474 U.S. at 131 n. 8, expressly declined to rule on isolated wetlands issues.

sand flats . . . sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds."[8] Giving those terms their common sense meanings, the court finds that neither the crystallizers nor the calcium chloride pits are "other waters."

Even if the phrase "such as" in front of those terms is interpreted, as it should be, to mean that the list is not exclusive, the definition of "other waters" is still limited to items of the same kind or class as those listed. See *Weyerhaeuser Steamship Co. v. United States*, 372 U.S. 597, 600-01, 83 S. Ct. 926, 10 L. Ed. 2d 1 (1963); 2A *Sutherland Statutory Construction* § 47.17 at 103 (4th ed. 1973). The items listed are all natural water conditions, and not artificially created structures.

The calcium chloride pits and former crystallizers were dug for use in manufacturing salt. They are not natural water conditions and are in fact dry most of the year. Even if the regulation is interpreted as extending the definition to include artificially created water bodies, the mere ponding of water on otherwise dry land is not enough to convert that land into "other waters."

This conclusion finds support in the Corps' statements concerning the regulations. The comments to the final regulations promulgated in 1986 state, "For clarification it should be noted that we do not consider the following waters to be 'Waters of the United States.' . . . Artificial lakes or ponds created by excavating and/or diking dry land to collect and retain water and which are used exclusively for such purposes as stock watering, irrigation, settling basins, or rice growing." 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986). The calcium chloride pits and former crystallizers are types of settling basins, and would not, under these comments, be considered "waters of the United States"

[8]The definition also includes "wetlands," which the court will discuss below under that specific provision of the regulation.

even if they were still operating and holding quantities of brine. The same conclusion is apparent when, as in recent years, water is no longer being pumped onto the property.

The court therefore finds and concludes that Leslie's properties are not "other waters" under 33 C.F.R. § 328.3(a)(3).

C. Wetlands

The Corps contends that virtually all of Leslie's property is a "water of the United States" because it is a "wetland." The Corps' jurisdiction over wetlands is contained in 33 C.F.R. § 328.3(a)(7): "Wetlands adjacent to waters . . . ." The term "wetlands" is defined in section 328.3(b) as

> those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

Most of the evidence at trial focused upon whether Leslie's property meets that definition. Both sides generally agreed that in making that decision, three primary indicators must be examined: (1) the water on the property ("hydrology"), (2) the condition of the soils, and (3) the extent and nature of the plant life. Those evaluations are made more difficult by the fact that the climate has distinct rainy and dry seasons, and the observations will vary depending upon when the indicators are examined.

The various and interrelated subportions of the definition of "wetland" in section 328.3(b), and the evidence pertaining to them, will be discussed below. However, by first looking at that definition as a whole, it is apparent that the primary indicator is the vegetation. That is, the land must be

sufficiently wet for a sufficient duration to support a prevalence of vegetation which is typically adapted for life in saturated soils. Bare land does not meet the definition. And vegetation does not do so unless there is a prevalence of vegetation typically adapted for life in saturated soils.[9]

The first part of the definition requires that the area be "inundated or saturated."[10] It was clear from the testimony that the property as a whole is not inundated or saturated by any tidal or "wash" action. The source of inundation and saturation of this property, if there is any, can only be rain. It was also clear that the property could be called "inundated" only during and for a short time immediately after winter rains.

The term "saturated" is not defined by the statute or the regulations. But the witnesses appeared to agree on its definition; that is, containing water to a point where the soil can hold no more water and oxygen in the soil is shut out.

Experts on both sides conducted extensive tests of the hydrology and of the soils to make a determination as to whether the property is inundated or saturated. Various tests were used in an attempt to measure the hydrology and degree of saturation. The results of each of those tests, and the specific methods and measures used by the experts, need not be discussed in detail. In general, the studies included analyzing the type of soil, the amount of oxygen in the soil,

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[9]Some comment is appropriate regarding the term "vegetation." The testimony demonstrated that at certain times of the year algae or alginates form on certain areas of the property. However, the witnesses were unanimous in their conclusion that algae is not "vegetation." That term requires a morphological type of structure. And further, algae can form in a wet condition in a matter of a few days.

[10]It makes no difference in this definition whether the inundation or saturation is by surface water or by ground water.

the amount of water in the soil, the color of the soil, and the amount of reduction of other chemicals.

Water has to be present in the vegetation root zone (by whatever number of inches the depth of that zone is measured) in order for the area to be a wetland. The root zone of this property reaches levels of saturation only during the rainy season. After the runoff of each rain, the root zone is not saturated. Those conclusions are true as to the property as a whole. They are also true as to the crystallizers, whether examined before their plowing or after, except that plowing did increase the temporary puddling of rainwater. The Corps' evidence did not establish the existence of saturation in the root zone area.

The Corps also contends that certain soils on the property are "hydric" by reason of their geological definition. That is, geologists use that term in describing certain types of soil. But that definition generally pertained to soils in layers well below the root zone, and to the wetness conditions when those layers were laid down in long-past geological history. Use of the term "hydric soils" does not really assist in a determination of whether the root zone soil meets the requirements of the regulation.

The Corps also argues for application of the principle of capillary rise; that is, water rises by capillary action from the water table up into higher layers of the soils. The court is prepared to accept this principle of physics. But the evidence was that even capillary rise did not necessarily reach the soils in the root zone. And indeed, even areas affected by capillary rise do not necessarily reach a saturated condition.

The court finds from weighing and evaluating all of the evidence, both percipient and expert, that the property is not "inundated or saturated."

After a rain that is heavy or long enough, any soil will become temporarily saturated. But that is not enough for a

determination of wetland under the regulations. The regulations goes on to state that the saturation must be "at a frequency and duration" sufficient to support a prevalence of vegetation typically adapted for life in saturated soil conditions. 33 C.F.R. § 328.3(b). The court finds from an evaluation of the evidence that there is not such a frequency or duration. As stated, it is simply not enough that rain water collect on property for a few days for that property to become a water of the United States.

The next requirement under regulation 328.3(b) is that the inundation or saturation be sufficient to support, and "under normal circumstances" does support, relevant types of vegetation. The U.S. Supreme Court has noted that this excludes upland areas that for some aberrational reason have some wetland-type vegetation. *Riverside Bayview Homes,* 474 U.S. at 130 n.7. The Corps acknowledges that its jurisdiction should not extend to "abnormal" conditions, but should pertain to truly aquatic areas; see exhibits 205, 209, 574. The evidence of the "normal circumstances" of the property again focused on the hydrology, the soils, and the vegetation. The evidence included both the present condition of the property and some recent history. And again, the finding of "normal circumstances" is made difficult by the seasonal nature of the rainfall.

It is clear that the eastern one-third of the property, both historically and under present conditions, has been pasture land supporting primarily upland and not wetland vegetation. The area of the crystallizers was not able to support much vegetation of any type, because it had been highly compacted and because its use in the manufacture of salt resulted in very saline soil. This condition was changed somewhat by the plowing of the crystallizers, which made them more hospitable to plant life. However, even since then the plant life has been sparse and has been limited in duration to the rainy season. It is unclear whether the Corps

considers the "normal circumstances" to be before or after the plowing. But in either event, the court finds that the salt crystallizer area could not support the relevant types of vegetation under normal circumstances.

Some areas of the crystallizers have been disturbed by the Caltrans construction and by the construction of the sewer line, leaving those areas in an altered condition. The court is willing, as urged by the Corps, to consider those present conditions as "normal" circumstances. Even so considered, the evidence compels the conclusion that during the vast majority of the year there is little or no vegetation on the crystallizer area.

Two areas in the southern corner of parcel 10 and in the southwest corner parcel 143, as well as some of the Caltrans ditches, do support vegetation of the relevant type. But circumstances in those areas are not "normal," because the ability to support vegetation was caused primarily by the government's flooding of the wildlife refuge across Thornton Avenue. And those conditions in those very small areas, even if accepted as normal, are not reflective of the normal circumstances of the property as a whole.

The next requirement under regulation 328.3(b) is that the property support a "prevalence of vegetation . . ." There is a difference between the parties as to what the term "prevalence of vegetation" means. Leslie interprets the requirement to mean that in looking at the condition of the ground as a whole, there must be a prevalence of vegetation. On the other hand, the Corps interprets the phrase to mean that if there is any vegetation on the land, all that is required is that the prevailing vegetation be of a type which is adapted for life in saturated soil conditions. This court believes that the Corps' interpretation is not reasonable. First, the Corps' position would compel the conclusion that if there were only *one* plant on a large parcel of ground, but if that one plant were adapted for life in saturated soil, then

the entire parcel must be a wetland. That position defies the common sense meaning of the word "wetland." Second, the Corps' interpretation is contrary to its own guidance manual on making wetland determinations. The manual requires that *before* determining the issue of the type of vegetation, a finding must first be made that vegetation is the predominate condition of the property. Indeed, in other areas of the United States the Corps does not agree with the interpretation being advanced as to "prevalence of vegetation" in this case. Finally, the Corps' interpretation appears contrary to the definition of wetland in section 328.3(b) read as a whole. When all the subclauses of 328.3(b) are read together, it is clear that the predominate condition of the land must be vegetation, and that the vegetation must be plants that can live in saturated soil conditions.

Leslie contends that the prevalence requirement means that fifty per cent or more of the site has to be covered by vegetation. This court need not set any exact percentage requirement for prevalence, since it is clear from the evidence in this case that the prevalence requirement has not been met under any reasonable standard regarding the questioned portions of the property.

The court finds from the evidence that the salt crystallizer areas have not and do not support a prevalence of vegetation. This finding is based upon the testimony describing the property, the historical condition of the property leading up to the "normal" conditions of today, aerial photographs taken over a period of years, and the fields notes and reports of the experts who examined the area.[11] There was no plant growth in the calcium chloride pits. With respect to the crystallizers, it is clear even from the Corps' evidence that

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[11] At the time of the construction of the freeway, the U.S. Fish & Wildlife Department urged that the highway interchange be put where it is, in the middle of the former crystallizers, because that location for the interchange was one of very low environmental impact.

no plant life exists in some areas, and in other areas plants cover only up to one per cent of the ground. And many of the plant types identified by the Corps live only during the immediate rainy season and die shortly thereafter. The Corps' witnesses nevertheless testified that those plants were adapted for an annual life cycle that includes dormancy during long dry periods. However, this court questions whether plants that are dead for as much as nine months of the year can meet a "prevalence of vegetation" requirement.

The final clause in the definition of "wetland" requires that the prevalent vegetation be of a type "typically adapted for life in saturated soil conditions." Botanists divide plants into roughly five categories for purposes of determining such adaptation. Those categories define the likelihood of a particular plant being found in saturated soil conditions. They range from those which are found in saturated conditions ninety-nine percent of the time, to those which are not listed and hence are rarely if ever found in saturated soil conditions. Whether a specific plant falls into a particular category may depend upon who is preparing the list. But there is a high degree of consistency in most of the lists.

The court heard extensive evidence on the types of plants found on the property and the nature and characteristics of those plants. On the eastern one-third of the property, the prevalent vegetation is upland grasses which are typically not adapted for life in saturated soil conditions. A few plants of a type which are typically adapted to such soil conditions (either highly likely or at least a positive indicator) were found during rainy months in certain of the plowed furrows in the former crystallizers and along the Caltrans ditches. The damper areas on the southernmost tip of parcel 10 and on the southwestern corner parcel 143 also contained such plants.

The court finds from the evidence as a whole that Leslie's property does not contain a prevalence of vegetation which is typically adapted for life in saturated soil conditions.

The court therefore finds from the evidence and from the definition of "wetlands" in 33 C.F.R. § 328.3(b), that the Leslie property is not inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and under normal circumstances it does not support, a prevalence of vegetation typically adapted for life in saturated soil conditions. It is therefore not a "wetland."

For a wetland to be a "water of the United States," there is an additional requirement. The wetland must also be "adjacent to waters" of the United States. 33 C.F.R. § 328.3(a)(7). The term "adjacent" is defined by subparagraph (c) of section 328.3 of that regulation. There was extensive testimony on whether various portions of Leslie's property, if found to be wetlands, were adjacent to waters of the United States. Since the court has concluded the property is not wetland, this adjacency requirement need not be discussed in detail.

Suffice it to say that the Corps' contentions on adjacency were built upon arguments using a jigsaw pattern of various areas of the property which, if deemed to be wetlands, could be "adjacent" to other areas of the property found to be waters of the United States. Most of those contentions have now been resolved against the Corps, because the contested areas were found not to be waters or wetlands.

One of the arguments of the Corps for adjacency is based upon the property that lies west of Thornton Avenue; that is, Newark Slough and the wildlife refuge, which are connected to the Leslie property by the culverts running under Thornton Avenue. The court finds and concludes that even if portions of Leslie's property were found to be wetlands, the adjacency requirement has not been satisfied. The reason is

that the condition which created the alleged wetland — that is, the flooding of the wildlife refuge and the resulting backing of water through the culverts — was contributed to by the United States itself and cannot under *City of Fort Pierre*, 747 F.2d 464, be considered in the adjacent wetlands determination.

The court therefore finds and concludes that the property is not a "water of the United States" as defined in 33 C.F.R. § 328, and hence is not within the jurisdiction of the Corps under the Clean Water Act.

X. Estoppel

Leslie also asserts that the Corps is estopped from asserting jurisdiction over the property. The argument is based upon actions which the Corps either did or did not take at the time of the Caltrans construction, the construction of the sewer, and the condemnation and use of the wildlife refuge. However, since the court has determined that the property is not "waters of the United States," and hence is not subject to the Corps' jurisdiction, the court need not consider this argument. The court is therefore making no findings of fact and expressing no opinion on Leslie's argument of estoppel.

XI. Attorneys Fees

Leslie has requested an award of attorneys fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A). Since Leslie is the prevailing party, that statute requires an award of attorneys fees and expenses to Leslie unless this court finds that the position of the United States was substantially justified or that special circumstances make an award unjust. The "substantially justified" standard requires only that the government's position must have been reasona-

ble in law and fact. *Pierce v. Underwood,* 487 U.S. 552, 108 S. Ct. 2541, 2549-51, 101 L. Ed. 2d 490 (1988).

While the court believes that some of the government's evidence and arguments were not reasonable, the court nevertheless concludes that the government's position as a whole was substantially justified and that special circumstances make an award to Leslie unjust. The Corps was motivated by a good faith concern for the objectives of Congress and for the Bay Area ecosystem. It was attempting to act in the public interest. The property has a high commercial value, and the amounts expended in this litigation are a very small percentage of its potential value. The government's evidence, although not meeting the burden of persuasion, does meet the burden of substantial justification for the action as a whole. The court therefore declines to award attorneys fees and expenses to Leslie, although Leslie is of course entitled to recover its costs of suit.

IT IS THEREFORE ORDERED that judgment should be entered as follows:

1. The Corps has no jurisdiction over the subject property under Section 10 of the Rivers and Harbors Act, because the property is not a "navigable water of the United States" within the meaning of the Rivers and Harbors Act or the regulations promulgated under that Act.

2. The Corps has no jurisdiction over the subject property under section 404 of the Clean Water Act, because the property is not a "water of the United States" within the meaning of the Clean Water Act or the regulations promulgated under that Act.

3. Leslie's work on the property did not and does not constitute a violation of the Rivers and Harbors Act or the Clean Water Act, and did not and does not require a permit from the Corps of Engineers.

4. In favor of plaintiff and against defendants and intervenors in action No. C-85-8615.

5. In favor of defendants and against plaintiffs in action No. C-86-4187.

Within fifteen (15) days of this order, Leslie is to submit to the court, and serve on the Corps, a proposed form of judgment that conforms to this opinion.

APPENDIX F

LESLIE SALT CO., a Delaware corporation,
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA, et al.,
Defendants,
and
SAVE SAN FRANCISCO BAY ASSOCIATION,
a non-profit California corporation;
NATIONAL AUDUBON SOCIETY,
a non-profit New York corporation,
Defendant-Intervenors-Appellants.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

LESLIE SALT CO., a Delaware corporation;
CARGILL, INC., a Delaware corporation,
Defendants-Appellees.

Nos. 89-15244 and 89-15337

United States Court of Appeals,
for the Ninth Circuit.

D.C. Nos. CV-85-8615-CAL and CV-86-4187-CAL

Filed August 27, 1990

ORDER

Before FARRIS, PREGERSON, and RYMER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX G

[Order of this Court Denying Certiorari]

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1990

No. 90-792. *Leslie Salt Co., et al. v. United States.* The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is denied.

Justice WHITE would grant certiorari.

Reported below: 896 F.2d 354.

APPENDIX H

[Constitutional, Statutory and Regulatory Provisions Involved]

UNITED STATES CONSTITUTION

Article I, Section 8, Clause 3:

The Congress shall have Power . . . ;

* * *

To regulate Commerce with foreign Nations, and among the several States . . . .

ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. § 553:

(a) This section applies, according to the provisions thereof, except to the extent that there is involved —

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance o the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply —

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except —

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

CLEAN WATER ACT

Section 301(a), 33 U.S.C. § 1311(a):

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

Section 309(d), 33 U.S.C. § 1319(d):

Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or (b)(8) of this title,[1] [footnote omitted] and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $25,000 per day for each violation. In determining the amount of a civil penalty the court shall consider the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require. For purposes of this subsection, a single operational upset which leads to simultaneous violations of more than one pollutant parameter shall be treated as a single violation.

Section 404(a), 33 U.S.C. § 1344(a):

The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites. Not later than the fifteenth day after the date an applicant

submits all the information required to complete an application for a permit under this subsection, the Secretary shall publish the notice required by this subsection.

Sections 502(7) & (12), 33 U.S.C. §§ 1362(7) & (12):

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

* * *

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

REGULATIONS OF THE CORPS OF ENGINEERS

33 C.F.R. § 328.3(a):

For the purpose of this regulation these terms are defined as follows:

(a) The term *waters of the United States* means

(1) all waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(2) All interstate waters including interstate wetlands;

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) Which are or could be used by interstate or foreign travelers or recreational or other purposes; or

(ii) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) Which are used or could be used for industrial purpose by industries in interstate commerce;

(4) All impoundments of waters otherwise defined as waters of the United States under the definition;

(5) Tributaries of waters identified in paragraphs (a)(1) through (4) of this section;

(6) The territorial seas;

(7) Wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1) through (6) of this section.

Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 123.11(m) which also meet the criteria of this definition) are not waters of the United States.

PREAMBLE TO THE PUBLICATION OF THE 1986 REGULATIONS OF THE CORPS OF ENGINEERS

51 Fed. Reg. 41217 (Nov. 13, 1986), in relevant part:

Section 328.3: Definitions. This section incorporates the definitions previously found in § 323.3(a), (c), (d), (f) and (g). Paragraphs (c), (d), (f) and (g) were incorporated without change. EPA has clarified that waters of the United States at 40 CFR 328.3(a)(3) also include the following waters:

a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines; or

c. Which are or would be used as habitat for endangered species; or

d. Used to irrigate crops sold in interstate commerce.